Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

GUY and BONNIE L. ADAMS (and others listed as parties), on their own behalf and on behalf of, and as Class Representatives of, all other persons similarly situated,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
and
BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioners' Complaint improperly dismissed under Fed. R. Civ. P. 12(b)(6) and 56 when, as a matter of law,

a. Under *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687 (1872), the Gold Bonds must be paid in gold, and not in any other legal tender, if a Bondholder requests such payment; and

b. Maintenance of Congress' 1933 and 1934 abrogation of contractual gold clauses is no longer constitutional due to post-1974 legislation inconsistent with the abrogation or because there is now no constitutional basis for prohibiting payment of the Gold Bonds in gold or its equivalent?

2. Was Petitioners' Complaint improperly dismissed under Fed. R. Civ. P. 12(b)(6) and 56 when

a. As a matter of fact, Burlington Northern ratified its obligation to pay gold for the Gold Bonds and significantly impaired the collateral for the Gold Bonds, an act not allowed by the Gold Bond indentures, and thereby created a new security required to be paid in gold; and

b. The trial court refused to grant Petitioners' Fed. R. Civ. P. 56(f) motion to conduct discovery about Respondents' corporate activities as they gave rise to substituted or novated contracts?

II. PARTIES

1. The Petitioners ("Bondholders") are 109 individuals and private trusts and the following 13 corporations:

Atwood-Hinzman Inc.
Barnts Medical Specialities, Inc.
Central Life Assurance Company (now known as Amerus Life Insurance Company)
DMN, Inc.
First Colony Life Insurance Company
Manhattan Life Insurance Company
Navy Mutual Aid Association
Ribob Company
Eljim Company
Security Mutual Life Insurance Company of New York
Super Jock 'n Jill, Inc.
Trustmark Life Insurance Company
Woodmen of World Life Insurance Company

Of these corporations, only First Colony Life Insurance and Manhattan Life Insurance Company are publicly traded. Pursuant to Supreme Court Rule 29.1 and to our knowledge, none of the companies is a parent or subsidiary of another public company. To our knowledge, the remaining corporations are neither publicly traded nor related to a publicly traded company.

2. Respondent Burlington Northern, Inc., is a publicly held company that has shares outstanding with the public. It has no parent company. Respondent Burlington Northern Railroad Company is Burlington Northern, Inc.'s wholly owned subsidiary.[1] Other than this, neither Respondent has subsidiaries or affiliates that have shares outstanding with the public.

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[1] Respondents are sometimes collectively called "Burlington Northern" in this Petition.

FULL LIST OF PETITIONERS

GUY and BONNIE L. ADAMS; TIMOTHY ADAMS; CLIFTON ALBRIGHT; JANET ALLOTT; ATWOOD-HINZMAN INC. PROFIT SHARING PLAN; VIVIAN AUDETT; HERB and BETTY BAILEY; BARNTS MEDICAL SPECIALTIES; ANNE BOWERS; TOM BRADLEY; ROBERT BRANDT, JR.; DONALD BROOKHART; BRIAN CATHCART; FRANK CATHCART; CENTRAL LIFE ASSURANCE COMPANY; E. WILLIAM and MARLENE CHADDERTON; KENNETH CHUN; VIVIAN CHAN CHUN; KENNETH COLLARD; KAREN DAVIS; CLIFFORD DAVIDSON; CHARLOTTE DE METRY; WAYNE DEMEESTER; DAPHNE DEMETRY; DMN, INC.; DAVID DRIVER; MARVIN DZIABIS; RAY EIFORD; ELJIM COMPANY; ALBERT EVERETT; BRUCE FEARING; JOYCE FEARING; FIRST COLONY LIFE INSURANCE COMPANY; RONALD FRAME; IGNACIA FUENTES; JANET GRATZER for Candace M. and Melanie A. Waiss; PETER and JANET E. GRATZER; FRANK GREEN; MAURICE HAGEN; BEN HANICH; FRANCIS HARTHORNE; SIEGFRIED HARTMANNS; LEE and ANNE HEINZINGER; M. HEINZINGER; WILLIAM R. and DELTA M. HELBIG, SR.; A. SHERMAN HILL; BRENT JAMES; BRYCE JAMES; CLIFFORD JAMES; LAUREL JAMES; GORDON JONES; RICHARD and MARNAE G. JONES; ALAN KAHN; ROBERT KEENHOLTS; CHARLES and CAROL KELTCH; MARVIN KLEIN; RALPH KLINGSHIRN; RICHARD KNUDSON; KERRIE ELIZABETH KNUTZEN TRUST, Gerald C. Knutzen, Trustee;

[continued]

KNUTZEN GRANDCHILDREN TRUST, Gerald C. Knutzen, Trustee; RAYMOND LOCK; MANHATTAN LIFE INSURANCE COMPANY; BERNARDA MANNING; ALBERT MILLER; MARY LOU MILLER; NAVY MUTUAL AID ASSOCIATION; JOHN NELSON; EUGENE ORRICO; MARK and SUSIE OVERBYE; JIM PARRIOTT; S. PERKINS; JOANN PETERSEN; RUSSEL and JANET PETERSON; JOSEPH PIGNATARO; NEIL PLUMLEY; ROBERT N.H. POOLE; RICHARD RALSTON; RICHARD RAU; RIBOB COMPANY; THEODORE ROBINSON; S & M SAKAMOTO PROFIT SHARING PLAN; WILLIAM SCROUP; HAROLD STACK; ELLIS STANLEY; MICHAEL and DANNA K. STEWART; ROBERT and MERRILY STEWART; SUPER JOCK 'N JILL, INC.; DEAN and SHARON SUZUKI; JAMES and YURI SUZUKI; DMYTRO and ROMAYNE SZWAYKA, JR.: WILLIAM TAFT; JAMES and SANDRA THOMAS; ALBERT and MARY ANN TORRICO; TRUSTMARK LIFE INSURANCE COMPANY; IRENE WALTERS; RICHARD WELSH; NANCY WIGGEN; LOIS WILLIAMS; HERMAN WOODCOCK; WOODMEN OF WORLD LIFE INSURANCE COMPANY; GLENN E. WRIGHT; JOHN ZYBURA,

On their own behalf and on behalf of, and as Class Representatives of, all other persons similarly situated.

Page

III. TABLE OF CONTENTS

I. QUESTIONS PRESENTED FOR REVIEW i

II. PARTIES. ii

III. TABLE OF CONTENTS. v

IV. TABLE OF AUTHORITIES vi

V. OPINIONS BELOW. 1

VI. JURISDICTIONAL STATEMENT 1

A. Basis for Subject Matter Jurisdiction. 1

B. Basis for Jurisdiction in the U.S. Supreme Court 1

VII. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS. 2

VIII. STATEMENT OF THE CASE 2

A. Case Overview and Facts. 2

B. Historical Background 3

C. Gold Legislation and the Gold Bonds 4

1. The 1933 Resolution Prohibited Payment of Gold Bonds Except With Legal Tender 4

2. Burlington Northern Assumed the Gold Bond Obligations 5

3. By Legislation Enacted Between 1973 and 1985, Congress Removed the Prohibition Against the Payment of Gold Bond Contracts in Gold 5

4. The *Rievman* Settlement 6

5. Burlington Northerns' Corporate Transactions 7

IX. REASONS FOR GRANTING THE WRIT 8

A. Standards for Summary Judgment 8

B. Burlington Northerns' Motion for Summary Judgment Should Have Been Denied Because the 1933 Resolution No Longer Prevents Payment of the Gold Bonds in Gold 8

Page

1. The Gold Bonds Are Now Payable in Gold 8

2. The 1933 Abrogation Act and The 1934 Gold Reserve Act No Longer Prevent Payment of the Gold Bonds in Gold 9

3. Alternatively, the 1933 Resolution Is Unconstitutional 10

C. It Is a Material Issue of Fact Whether Burlington Northern Has Issued a New Security by Creating a Substituted Contract or Novation of the Gold Bonds 12

1. *Rievman* and Burlington Northerns' Other Actions Created a New Security 12

a. The *Rievman* Settlement Created a New Security Through a Change in the Collateral for the Gold Bonds 14

b. *Fay* and Burlington Northerns' Corporate Modifications Created a New Security 15

2. The Bondholders Were Improperly Denied Fed. R. Civ. P. 56(f) Relief 19

X. CONCLUSION 20

IV. TABLE OF AUTHORITIES

Cases:

Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977), *cert. denied sub nom. Harry Goodkin & Co. v. Abrahamson*, 436 U.S. 905, *and cert. denied*, 436 U.S. 912 (1978) 12, 13

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Cases, continued: Page

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Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) 11

Contractors Ass'n v. City of Philadelphia, 945 F.2d 1260 (3d Cir. 1991) 19

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Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) 11

Guaranty Trust Co. v. Henwood, 307 U.S. 247 (1939) 3

In re Averhoff, 18 B.R. 198 (Bankr. N.D. Iowa 1982) 13

In re Tardy, 18 B.R. 36 (Bankr. C.D. Ill. 1982) 13

Jewel Cos., Inc. v. Pay-Less Drug Stores N.W., Inc., 741 F.2d 1555 (9th Cir. 1984) 16

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Rievman v. Burlington N. R.R. Co., 618 F. Supp. 592 (S.D.N.Y. 1985) 6

Rievman v. Burlington N. R.R. Co., 644 F. Supp. 168 (S.D.N.Y. 1986) 6

Schickler v. Santa Fe S. Pac. Corp., 593 N.E.2d 961 (Ill. App. 1992) 10

Trebilcock v. Wilson, 79 U.S. (12 Wall.) 687 (1872) . . . . . i, 9

Cases, continued: Page

United States v. Interstate Commerce Comm'n, 396 U.S. 491 (1970) 5

VISA Int'l Serv. Ass'n v. Bankcard Holders of Am., 784 F.2d 1472 (9th Cir. 1986). 19, 20

Constitutional Provisions:

U.S. Constitution, Article I, Section 8, Clause 5 2

U.S. Constitution Amendment V 2

Statutes:

15 U.S.C.A. §77aaa. 13

28 U.S.C. §1254. 1

28 U.S.C. §1331. 1

28 U.S.C. §1332. 1

28 U.S.C. §2101(c) 1

31 U.S.C. §§442, 443 5

31 U.S.C. §5112(h). 6

48 Stat. 112 (1933) (codified at 31 U.S.C. §463) 5

Pub. L. No. 93-110, 87 Stat. 352, tit. I (1973) 5

Pub. L. No. 93-373, 88 Stat. 445 (1974) 5

Pub. L. No. 95-147, 91 Stat. 1227 (1977) 5

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Court Rules:

Fed. R. Civ. P. 12 . . . . . i, 1

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U.S. Supreme Court Rule 13.1. 1

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Page

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Message of the President of the United States Transmitting His Budget for the Service of the Fiscal Year Ending June 30, 1933 (1931) 3

Restatement (Second) of Contracts §279 (1981) 13

Robert Hunt Lyman, *The World Almanac and Book of Facts for 1933* (1933) 3

The World Almanac and Book of Facts (1994) 3, 4

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The World Almanac and Encyclopedia (1921) 3

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58 Am. Jur. 2d *Novations* §40 (1989) 13, 18

V. OPINIONS BELOW

On November 15, 1993, the Bondholders filed their Complaint alleging that certain pre-1933 obligations of Respondent are now payable to the Bondholders in gold or its equivalent in value. App. C. On April 11, 1994, the U.S. District Court for the Western District of Washington granted Respondents' Fed. R. Civ. P. 12(b) and 56 motions to dismiss the Bondholders' Complaint. The Court also denied the Bondholders' Rule 56(f) motion. A related judgment of dismissal was entered that same day. See App. B.

The Bondholders appealed to the U.S. Court of Appeals for the Ninth Circuit. That court on April 10, 1996, affirmed the dismissal. *Adams v. Burlington N. R.R. Co.*, 80 F.3d 1377 (9th Cir. 1996). App. A.

VI. JURISDICTIONAL STATEMENT

A. Basis for Subject Matter Jurisdiction

The district court had original jurisdiction over this action under 28 U.S.C. §1331 because of a federal question arising under U.S. statutes. The court also had original jurisdiction under 28 U.S.C. §1332 because the parties are diverse and because the amount in controversy exceeded $50,000.

B. Basis for Jurisdiction in the U.S. Supreme Court

This Petition was filed within 90 days after the entry of the Court of Appeals' decision, as required by 28 U.S.C. §2101(c) and Supreme Court Rule 13.1.

Under 28 U.S.C. §1254, this Court has jurisdiction over an appeal from a final judgment or order of the Court of Appeals.

VII. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision pertinent to this Petition is U.S. Constitution, Article I, Section 8, Clause 5, relating to Congress' power to regulate the nation's monetary system, and U.S. Constitution Amendment V.

The list of pertinent statutes is at page viii of this Petition and in the Table of Contents to App. E.

VIII. STATEMENT OF THE CASE

A. Case Overview and Facts[2]

The Bondholders have sued to enforce "gold clauses" in Respondents' 100- and 150-year maturity railroad bonds that require payment of principal and interest in gold or its equivalent.

Although some courts have considered other gold clauses and gold-clause questions, this case presents a number of issues of first impression. For example:

- What is the effect on Burlington Northern's gold payment duties under Gold Bonds, issued before 1933, in view of recent statutes that now make gold "legal tender" and thus remove any gold payment impediment caused by a 1933 Depression-era congressional resolution?
- What is the effect on Burlington Northern's Gold Bond obligations resulting from its lawsuit settlement and corporate restructuring activities?

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[2]The basic facts are set out in the Circuit Court's opinion, App. A. The Bondholders consist of persons and entities who purchased the Gold Bonds both before and after 1933.

Burlington Northern refuses to pay interest and principal on the Gold Bonds in gold or its equivalent. This refusal is based upon Burlington Northerns' interpretation of congressional enactments in 1933 and 1934 that declared gold no longer to be legal tender for the payment of gold-clause contracts.

Since 1985, gold is again legal tender. Gold coins are now issued by the United States. Payment in gold is no longer against public policy. The Gold Bonds should now be paid in gold or its equivalent.

In addition, recent corporate activities by Burlington Northern, including the settlement of a lawsuit, have created new securities of the Gold Bonds.

B. Historical Background

After the Civil War, gold clauses were routinely inserted into long-dated bonds to protect creditors against inflation and debtors against deflation. These bonds often had maturity dates of 100 years and longer.[3]

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[3] *See generally Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 257 (1939). Before 1933, approximately 55 percent of all long-term debt obligations contained gold clauses. Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 Chi. L. Rev. 504, 523 (1983).

Inflation has seen, for example, the salaries of members of Congress rise from $5,000 in 1897 to $7,500 in 1921 and from $10,000 in 1933 to $133,600 in 1994. *The World Almanac and Encyclopedia* 409, 412 (1897); *The World Almanac and Encyclopedia* 737, 740 (1921); Robert Hunt Lyman, *The World Almanac and Book of Facts for 1933* 183, 184 (1933); *The World Almanac and Book of Facts* 618, 619 (1994). Salaries of Associate Justices of the Supreme Court have increased from $10,000 in 1897, $14,500 in 1921 and $20,000 in 1933 to $164,100 in 1994. Federal appeals court judges' salaries have increased from $6,000 in 1897, $8,500 in 1921 and $12,500 in 1933 to $141,700 in 1994. *The World Almanac and Encyclopedia* 390 (1897); *The World Almanac and Encyclopedia* 614 (1921); *Message of the*

[footnote continued]

Most gold bonds were issued in the late 19th and early 20th centuries to construct railroads and utilities, which were then very speculative enterprises. Investors bought these gold bonds because they were fully secured by enormous land grants issued by Congress.[4] These vast land grants were rich in timber, coal, and other resources. The gold clause and land grants together offered investors the requisite confidence and asset base necessary to raise the capital required to construct the nation's railroads. Bondholders accepted a low interest rate in exchange for a guaranteed return of purchasing power as defined in terms of gold.

The Gold Bonds were intended to be passed from one generation to the next: their secured indentures explicitly stated that their interest and principal were to be payable in gold to the holder or to his heirs and assigns.

C. Gold Legislation and the Gold Bonds

1. The 1933 Resolution Prohibited Payment of Gold Bonds Except With Legal Tender

In 1933, Congress passed a Joint Resolution (the Abrogation Act) declaring gold clauses "against public policy" and providing that any obligation containing a gold clause "shall be discharged upon payment, dollar for dollar, in any coin or currency which *at the time of payment is*

President of the United States Transmitting His Budget for the Service of the Fiscal Year Ending June 30, 1933 390 (1931); *The World Almanac and Book of Facts* 180 (1933); *The World Almanac and Book of Facts* 84, 85 (1994).

[4] Bill Yenne, *The History of the Burlington Northern* (Brompton Books Corp. 1991). Thus, Burlington Northern became known as a "Land Grant" railroad. *See also* Louis Tuck Renz, *The History of the Northern Pacific Railroad* (Ye Galleon Press 1980).

legal tender for public and private debts." 48 Stat. 112 (1933) (codified at 31 U.S.C. §463) (emphasis added).

In 1934, Congress enacted the Gold Reserve Act, which banned private ownership and the use of gold as legal tender. 31 U.S.C. §§442, 443. Because gold was no longer "legal tender," principal and interest on Gold Bonds were payable only in lawful U.S. currency, i.e., dollars.

2. Burlington Northern Assumed the Gold Bond Obligations

In 1970, Northern Pacific, Great Northern, and two other railroad companies merged into Burlington Northern. *See United States v. Interstate Commerce Comm'n,* 396 U.S. 491 (1970); App. D. Following the mergers, Burlington Northern became the successor obligor under the Gold Bonds.

3. By Legislation Enacted Between 1973 and 1985, Congress Removed the Prohibition Against the Payment of Gold Bond Contracts in Gold

In 1973 and 1974, Congress enacted the Gold Ownership Amendments, which repealed the 40-year prohibition on private ownership of gold. Pub. L. No. 93-110, 87 Stat. 352, tit. I (1973); Pub. L. No. 93-373, 88 Stat. 445 (1974). In 1977, Congress expressly amended the 1933 Resolution by allowing the use of gold clauses from October 27, 1977, forward. Pub. L. No. 95-147, 91 Stat. 1227 (1977) (the "1977 Amendment").[5]

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[5]In support of the enactment of the 1977 Amendment, Senator Jesse Helms stated that the statute "is intended to stand

[footnote continued]

In 1982, the 1933 Resolution and the 1977 Amendment were reworded to read:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

Pub. L. No. 97-258 (1982) (codified at 31 U.S.C. §5118-(d)(2)).

In 1985, Congress authorized the minting of gold coins by the U.S. government. 31 U.S.C. §5112(h) (the "1985 Statute"). As a result, gold coins were issued and became "legal tender" at their face value for the first time since 1933.

Since Congress passed the 1977 Amendment and the 1985 Statute, there have been no legal impediments to payment of the Gold Bonds in gold.

4. The *Rievman* Settlement

Until recently, the Northern Pacific Gold Bonds were secured by Land Grants of railroad property owned by Northern Pacific as of November 1896 and millions of acres of valuable land in the northwest and midwest United States (the "Resource Properties"). *See Rievman v. Burlington N. R.R. Co.*, 618 F. Supp. 592 (S.D.N.Y. 1985) (*"Rievman I"*); *Rievman v. Burlington N. R.R. Co.*, 644 F. Supp. 168 (S.D.N.Y. 1986) (*"Rievman II"*); *Rievman*

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neutral with regard to the enforceability of gold clause obligations issued in the past." 123 Cong. Rec. 633, 635 (1977) (statement of Sen. Jesse Helms). Today, with gold coins again "legal tender," Helms' statement of the statute's "neutrality" further supports the Bondholders' claims: It can be used neither as a sword nor as a shield.

v. Burlington N. R.R. Co., 118 F.R.D. 29 (S.D.N.Y. 1987) ("*Rievman III*").

In 1987, after two unsuccessful attempts, Burlington Northern negotiated a settlement with the *Rievman* bondholders to release the Resource Properties in return for $35.5 million. *Rievman III*, 118 F.R.D. at 31.[6]

Burlington Northern's settlement of *Rievman* and its release of the Resource Properties created a new security resulting from a substituted contract or novation of the Gold Bonds.

5. Burlington Northerns' Corporate Transactions

After October 1977, Burlington Northern engaged in a number of corporate transactions, including mergers, consolidations, divestitures, spinoffs, and offers to purchase and exchange. These transactions resulted in new Gold Bond obligations, by way of Burlington Northerns' ratification of its Gold Bond obligations and substituted contracts or novations, and the resulting creation of new securities.

Burlington Northern admits five corporate transactions it considers relevant. *See* App. F. In four of these transactions, stock of the merged entities that had been pledged as security for the Gold Bonds was released as security.

In addition to the transactions acknowledged by Burlington Northern, the Bondholders have learned of at least six other significant transactions. *See* App. G.

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[6]In 1988, Burlington Northern transferred the Resource Properties to subsidiaries of a separate company, Burlington Resources Inc., which was then spun off as a separate public company. Burlington Northern admits that after the transfer, it incurred a "substantial debt load." At the same time, Burlington Resources Inc. had a market value of more than $5.7 billion.

Burlington Northern's corporate transactions (those acknowledged and those not acknowledged by Burlington Northern) resulted in substituted contracts or novations of the Gold Bonds. The Bondholders believe that there *also* may be other corporate transactions they have not been allowed to discover because of the district court's refusal to grant them Fed. R. Civ. P. 56(f) relief.

IX. REASONS FOR GRANTING THE WRIT

A. Standards for Summary Judgment

The court below viewed this case in the context of the trial court's summary judgment dismissal of the Bondholders' Complaint. A request for summary judgment must be denied when, viewing the evidence in the light most favorable to the nonmoving party, a genuine issue exists regarding any material fact. Even when certain facts are undisputed, if different ultimate inferences might reasonably be drawn about which reasonable persons might differ, the case is not suitable for summary judgment.

Burlington Northern did not meet this heavy burden, and the courts below have denied the Bondholders' request for Fed. R. Civ. P. 56(f) relief.

B. Burlington Northerns' Motion for Summary Judgment Should Have Been Denied Because the 1933 Resolution No Longer Prevents Payment of the Gold Bonds in Gold

1. The Gold Bonds Are Now Payable in Gold

Burlington Northern contends, without support, that the Gold Bonds may be paid in "any" legal tender currency of the United States. The Court of Appeals agreed. *Adams v. Burlington N. R.R. Co.*, 80 F.3d

1377, 1381 (9th Cir. 1996). But both ignore the rejection of this argument over a century ago by *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687 (1872). There the parties had contracted for payments under a promissory note "in specie" (i.e., in gold). The obligor argued that he could lawfully choose between payment in gold or in U.S. notes, which were also "legal tender." The Supreme Court disagreed, holding that, despite the existence of two forms of legal tender, the parties' agreement expressly provided for the method of payment: gold. *Id.* at 695.

Burlington Northern has not tried to avoid the effect of the 1933 Resolution. It candidly admits that after gold clauses became enforceable again, it intentionally and aggressively tried to avoid reviving its gold-clause obligations.

Today the only inhibition on Burlington Northern's making payment in gold is its own unwillinginess to do so. But its unwillingness contradicts *Trebilcock*.

2. The 1933 Abrogation Act and the 1934 Gold Reserve Act No Longer Prevent Payment of the Gold Bonds in Gold

The Bondholders allege that Burlington Northern has breached its contractual obligations under the Gold Bonds. Burlington Northern does not challenge the sufficiency of the Bondholders' allegations. Instead, it argues that the 1933 Resolution provides a "complete defense" to the Bondholders' contract claims as a matter of law. It does not.

As a matter of statutory interpretation and contract law, the 1933 Resolution is no longer an impediment to Burlington Northern's performance.

After enactment of the 1933 Resolution and related legislation, obligors could not legally pay principal and interest in gold because it was no longer legal tender. Duties under the Gold Bonds could be discharged by paying in the *only* currency that was legal tender: U.S. notes not indexed to changes in the price of gold. This is no longer true. U.S. gold coins *are now* also issued as "legal tender," as they have been since 1985 when Congress repealed the impediments of the 1933 Abrogation Act and the 1934 Gold Reserve Act. Once again, the Gold Bonds are payable in gold.

3. Alternatively, the 1933 Resolution Is Unconstitutional

The Bondholders have set forth a basis for enforcing Burlington Northern's gold-clause obligation that is consistent with the viability of the 1933 Resolution, as amended. *See supra* at 8-10.

Alternatively, the Bondholders believe that because the 1985 Statute now makes gold coins "legal tender," continued application of the 1933 Resolution to the Gold Bonds is unconstitutional.[7] Although implied repeal is not favored by the courts, a statute that is irreconcilable with a prior statute effects an implied

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[7] After the ban on private ownership of gold was lifted in 1974, lawsuits to enforce gold clauses were filed on the grounds that these "Gold Ownership Amendments" impliedly repealed the 1933 Resolution. Several courts rejected this theory. *See, e.g., Feldman v. Great N. Ry. Co.*, 428 F. Supp. 979 (S.D.N.Y. 1977). The courts have *not* considered whether the 1985 Statute impliedly repealed the 1933 Resolution. In the most recent state court gold-clause decision, *Schickler v. Santa Fe S. Pac. Corp.*, 593 N.E.2d 961 (Ill. App. 1992), the court considered an implied-repeal argument based on the 1977 Amendment, not on the 1985 Statute. In any event, these authorities do not bind this Court.

repeal. *Morton v. Mancari,* 417 U.S. 535, 550 (1974); *see also Georgia v. Pennsylvania R.R. Co.,* 324 U.S. 439, 456-57 (1945).

The Bondholders do not claim that the 1933 Resolution was unconstitutional when enacted. They claim that it is unconstitutional *now.* The 1933 Resolution was enacted to assure a uniform value of U.S. coins and currency in accordance with Congress' power to regulate money. In 1933 gold had a monetary function in our economy. Today it does not. There is no longer a rational basis on which to apply the 1933 Resolution to the Gold Bonds. This is made manifest by Congress' reinstatement of gold clauses in 1977. As a result of the 1985 Statute, gold coins are now minted as legal tender. Thus, the 1933 Resolution and the 1985 Statute cannot be reconciled.

The enactment of the 1985 Statute also supports a declaration of unconstitutionality of the 1933 Resolution under the "changed circumstances" doctrine recognized in *Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924).

If gold is not legal tender, it is a commodity. If so, the 1933 Resolution applied to the Gold Bonds is arbitrary and capricious and lacks any continued rational basis. The constitutionality of the 1933 Resolution was based on Congress' power to regulate *the monetary system,* i.e., to coin money and regulate its value. *Norman v. Baltimore & Ohio R.R. Co.,* 294 U.S. 240 (1935). By contrast, Congress does *not* have the same sweeping authority to regulate the use and value of a commodity.

> Once the dollar was fully divorced from gold, . . . *gold has become basically equivalent to any other commodity.* Unless it could have been shown that

> gold continued to carry with it important aspects of the mythology that surrounded it as a monetary metal, and, because of this, would greatly interfere with the monetary structure if freely allowed to circulate among persons, there would have been *no constitutional basis* for continuation of the restrictions on private ownership of gold, on private dealings in gold, and on the insertion of gold clauses in contracts.

James Buchanan & Nicholas Tideman, *The Limits of Governmental Monetary Authority, in Gold, Money and the Law* 59-60 (Henry G. Manne & Roger L. Miller eds. 1975) (emphasis added).

Burlington Northern cannot maintain a defense based on an unconstitutional statute.

C. It Is a Material Issue of Fact Whether Burlington Northern Has Issued a New Security by Creating a Substituted Contract or Novation of the Gold Bonds

1. *Rievman* and Burlington Northerns' Other Actions Created a New Security

When the rights of a security holder have been substantially affected by a change in the terms of the outstanding security, that security becomes a new security. *See Abrahamson v. Fleschner,* 568 F.2d 862, 868 (2d Cir. 1977), *cert. denied sub nom. Harry Goodkin & Co. v. Abrahamson,* 436 U.S. 905, *and cert. denied,* 436 U.S. 912 (1978) (the test is whether there is a change in the nature of the investment risk significant enough to create a new investment); *see* Louis Loss & Joel Seligman, *Securities Regulation* 1086 (3d ed. 1989); Bryant Edwards, *Modifying Debt Securities: The Search for the Elusive "New Security",* 47 Bus. Law. 571 (1992).

While *Abrahamson* directly concerned a claim under the Securities Exchange Act of 1940 and the Investment Advisers Act of 1940, the principle it announces is valid here, standing alone or in relation to the Trust Indenture Act of 1939, as amended,[8] which may apply here.

A new security may be created by a substituted contract or novation. A substituted contract is created when the obligee accepts a new contract in satisfaction of the obligor's existing duty; it discharges the original duty and creates a new duty. *Restatement (Second) of Contracts* §279 (1981).

A substituted contract created by a novation of a contract containing a gold clause can revive obligations to pay in gold. *See Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 952-53 (W.D. Wash. 1986) (assignment of lease), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990).

A novation can result from a change in security for an indebtedness.

> When, in the more modern cases, the obligee has taken a new mortgage or security interest, the tendency has been to find that there has been a novation. This has been the case in consumer as well as commercial contexts, and has been so where the new security interest was lesser than the one which already existed.

58 Am. Jur. 2d *Novations* §40 (1989). *See, e.g., In re Tardy*, 18 B.R. 36 (Bankr. C.D. Ill. 1982) (novation resulted from release of security); *In re Averhoff*, 18 B.R. 198 (Bankr. N.D. Iowa 1982) (novation resulted from addition of security).

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[8] 15 U.S.C.A. §77aaa.

The indenture creating the bond security is a contract. *See Katz v. Oaks Indus., Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986). After the contract has been made and resulting bonds are outstanding, it should be virtually impossible to remake the contract without the express consent of all bondholders. This is especially true here: the Gold Bond indentures do not provide for corporate modifications (such as those undertaken by Burlington Northern) if those modifications impair the lien and security of the indenture or any of the Bondholders' rights.[9] Except for *Rievman*, none of Burlington Northern's significant corporate modifications involved the Bondholders' consent. And *Rievman* never even addressed the gold-clause issue that is the subject of these proceedings.

a. The *Rievman* Settlement Created a New Security Through a Change in the Collateral for the Gold Bonds

Burlington Northerns' settlement of the *Rievman* lawsuit created a new security. Burlington Northern replies that the *Rievman* settlement did not result in such a contract because the obligor remained the same.[10]

A new security was created when, in *Rievman*, Burlington Northern significantly changed the Northern Pacific Bondholders' investment risk by substantially reducing the collateral for their Gold Bonds. After *Rievman* they owned something significantly different from what they owned before *Rievman*.

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[9] *See, e.g.*, App. H.

[10] Burlington Northern has also argued that certain language included in the settlement agreement protects it from a novation. Like the obligor in *Fay Corp.*, however, Burlington Northern cannot so easily shield itself from the legal consequences of its actions.

The *Rievman* settlement involved the release of the Resource Properties – over $5 billion worth of collateral for the Gold Bonds. The enormous value of the Resource Properties (and their subsequent "spin-off") represented not just a more than 80 percent reduction in the security for the Gold Bonds (which after *Rievman* was less than $800 million; *see Rievman III,* 118 F.R.D. at 31), but also a fundamental change in the obligor company.[11]

As with the mergers, the Bondholders have sought discovery of documents from Burlington Northern regarding the *Rievman* settlement. Burlington Northern has refused to produce these documents. Nevertheless, even the information that is available – information about the release of billions of dollars worth of security from the Gold Bonds – demonstrates that a new security was created by the *Rievman* settlement.

b. *Fay* and Burlington Northerns' Corporate Modifications Created a New Security

The 1977 Amendment states that gold-clause contracts entered into after October 27, 1977, are enforceable.

The issue is whether Burlington Northern's corporate modifications gave rise to a new security and thus a new obligation to pay the Gold Bonds in gold.

The Bondholders contend that Burlington Northern's various corporate activities and events after October 1977 created new securities of the Gold Bonds. Burlington Northern attempts to limit these modifications to selected events and supplemental indentures of its choosing. *See* App. F. It contends that these events conclusively prove

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[11] In its 1988 Annual Report to its shareholders, Burlington Northern confessed: "We also must manage the substantial debt load remaining after the spin-off of Burlington Resources Inc."

that a substituted contract or novation has not resulted. This argument is wrong.

First, Burlington Northern's subjective interpretation of the effect of these complex modifications cannot be taken at face value, especially when Burlington Northern refused the Bondholders' discovery requests. Because of the unavoidable complexity of such corporate transactions, summary judgment is particularly inappropriate. *Jewel Cos., Inc. v. Pay-Less Drug Stores N.W., Inc.,* 741 F.2d 1555 (9th Cir. 1984). In *Jewel,* the Ninth Circuit reversed the trial court's entry of summary judgment and remanded the case so that "the district court will have the opportunity to examine thoroughly the documents generated during the [merger] negotiations, evaluate the testimony of the parties to those negotiations, and consider evidence relating to customary corporate practice . . . ." *Id.* at 1567. Burlington Northern has too narrowly limited the documents that may be relevant to its complex corporate modifications.

Second, the very existence of supplemental indentures raises serious questions because the Gold Bonds do not provide for modifications if they impair the lien and security of the Gold Bonds. App. H.

Third, Burlington Northern has too narrowly limited the events that might have resulted in a ratification, substituted contracts or novation. For example, the Bondholders have learned of additional mergers, consolidations and corporate events that have not been acknowledged by Burlington Northern and that may have resulted in novations. *See, e.g.,* App. G; see also App. H at 78, 80a concerning ratification by the assumption of payment duties.

Fourth, even the limited events acknowledged by Burlington Northern indicate the creation of a substituted

contract or novation. For example, the "original indentures" treat any consolidation or merger as resulting in a "successor corporation" and "such successor . . . corporation shall assume" all payment and other obligations of the Gold Bonds and "shall succeed to, and be substituted for, the Railway Company." App. H at 78a, 80a. The "supplemental indentures" relating to a "reverse triangular merger" contain language which satisfies the original indentures and provide that Burlington Northern "hereby assumes" all the payment and other obligations of the Gold Bonds "so that . . . Burlington Northern Railroad Company shall succeed to and be substituted for Burlington Northern Inc." *See, e.g.,* App. I. Moreover, the mergers effected a material change to the corporate quintessence of Burlington Northern. The company assumed huge debts and liabilities, e.g., over $195 million of bond debt and other liabilities in the St. Louis-San Francisco merger, *see Burlington N. Inc. - Control & Merger - St. Louis-San Francisco Ry. Co.,* 360 I.C.C. 788 (1980), and over $129 million of bond debt alone in the Colorado and Southern merger.[12]

Burlington Northern argues that its transactions did not result in substituted contracts or novations because

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[12]The essence of Burlington Northern was changed by the cumulative effect of its 1981 "reverse triangular merger," its 1988 transfer of the Resource Properties, and its spin-off of Burlington Resources. For example, when Burlington Northern sought approval for its 1981 "reverse triangular merger," its railway union expressed a "basic fear . . . that the creation of a holding company eventually would lead to the transfer to certain of the railroad's non-transportation assets to holding company subsidiaries, thereby weakening the railroad's financial position." *Brotherhood of Ry. & Airline Clerks v. Burlington N. Inc.,* 513 F. Supp. 1023, 1027 (D. Minn.), *dismissed without opp.,* 664 F.2d 294 (8th Cir. 1981). The transaction was nevertheless approved, and the Bondholders believe that this fear was justified.

the obligor remained the same. This argument ignores the fact that a substituted contract and novation may be created by a *change in the security* of an indebtedness. 58 Am. Jur. 2d *Novations* §40 (1989).

Burlington Northern *admits* that at least four of its post-October 1977 mergers involved *changes to the security* under the Gold Bonds. Specifically, in each of the mergers with the Colorado and Southern Railway Company, the Fort Worth and Denver Railway Company, the Galveston Terminal Railway Company and the Lake Superior Terminal and Transfer Railway Company, the merged entities' stock that had been pledged as security for the Gold Bonds was released. These changes in security create a material issue of fact about whether they resulted in a new security.

Fifth, Burlington Northern argues that at no point after 1977 did it manifest an intent to ratify or assume the obligations to pay the Gold Bond debts in gold. It concludes that because it lacked this intent, a novation was not created. This misperceives the law of substituted contracts or novations.

The existence of a substituted contract or novation and a resulting new security, is an issue of fact. *See Fay Corp.,* 646 F. Supp. at 950.

Sixth, Burlington Northern prevented the Bondholders from conducting discovery about its corporate activities that may have resulted in novations. Mergers and consolidations involved voluminous and complex documents. The Bondholders believe that complete information (not just unilaterally selected portions) regarding

Burlington Northern's mergers, consolidations, and other corporate activities will demonstrate novations.

2. The Bondholders Were Improperly Denied Fed. R. Civ. P. 56(f) Relief

If the grant of Burlington Northern's summary judgment motion is not reversed outright, the motion should be continued as premature. Fed. R. Civ. P. 56(f). When defendants control the relevant information, summary judgment motions are routinely denied or continued:

> If information concerning the facts to be discovered is solely in the possession of the movant, however, "a motion for continuance of a motion for summary judgment for purposes of discovery *should . . . ordinarily be granted almost as a matter of course.*"

Contractors Ass'n v. City of Philadelphia, 945 F.2d 1260, 1263 (3d Cir. 1991) (emphasis added) (quoting *Ward v. United States*, 471 F.2d 667, 670 (3d Cir. 1973)). *See generally* 10A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §2741, at 545 (2d ed. 1983). Moreover, summary judgment is "especially inappropriate where the material sought is also the subject of outstanding discovery requests." *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986).

In January 1994, the Bondholders served discovery requests seeking, among other things, internal documentation about the Gold Bonds; the various mergers, consolidations, and other corporate activities; and the *Rievman* settlement. Burlington Northern refused to produce any of these documents.

At the very least, it was error not to deny as premature or not to continue under Rule 56(f) Burlington North-

ern's summary judgment motion. Because the Bondholders' case "is so heavily dependent upon its ability to probe the facts and circumstances relating" to the actions and intentions of defendants, summary judgment was improper at this early stage of the litigation. *See VISA Int'l*, 784 F.2d at 1475.

X. CONCLUSION

Unless the gold clauses are enforced, the Bondholders' claims will be extinguished for a pittance and Burlington Northern will continue to reap the windfall from which it has benefited since 1933. This unjust transfer of wealth from creditor to debtor should not be allowed to continue when it has been so clearly foreseen and prudently guarded against by contract and when statutory changes, ratification, substituted contracts, or novations have revived sleeping gold-clause obligations.

The courts below were mistaken when they dismissed the Bondholders' Complaint. As a matter of law, the Bondholders have stated valid claims against Burlington Northern for payment of the Gold Bonds in gold. Nothing legally impedes payment of the Bondholders' Gold Bonds in gold. Due to recent statutory changes, contract payment in gold is once against consistent with U.S. public policy.

In addition, issues of material fact and the need for discovery preclude summary judgment. The Bondholders should be allowed to submit to a jury and trier of facts the claims raised in their Complaint.

Therefore, the Bondholders respectfully request that this Court grant the Writ sought by this Petition and ultimately reverse the grant of Burlington Northern's motions to dismiss and for summary judgment.

The Bondholders should be allowed to conduct discovery and to try their case.

DATED July 9, 1996.

Respectfully submitted,

CAMDEN M. HALL
(Counsel of Record)
FOSTER PEPPER & SHEFELMAN
Attorneys for Petitioners.

Supreme Court, U.S.
FILED

96 51 JUL 9 1996

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

GUY and BONNIE L. ADAMS (and others listed as parties), on their own behalf and on behalf of, and as Class Representatives of, all other persons similarly situated,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
and
BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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86 pp

Page

TABLE OF CONTENTS

APPENDIX A – Opinion of United States Court of Appeals for the Ninth Circuit (April 10, 1996) 1a

APPENDIX B – Order Of Dismissal and accompanying Judgment In A Civil Case, of United States District Court, Western District of Washington, At Seattle, dated April 11, 1994 . . . . . 17a

APPENDIX C – Complaint, filed November 15, 1993 . . . . . 19a

APPENDIX D – Excerpts from Lynn M. Voskuil, Burlington Northern, Inc., in 5 International Directory Of Company Histories 428 (Adele Hast, ed., St. James Press 1992) re: Burlington Northerns' history 1960-1990 . . . . . 48a

APPENDIX E – Statutes, Rules, Constitutional Provision, Congressional Proceedings:

– 48 Stat. 112 (1933) 51a

– 31 U.S.C. §442, 443 . . . . . 53a

– Pub. L. No. 93-110, 87 Stat. 352, tit. I (1973) 56a

– Pub. L. No. 93-373, 88 Stat. 445 (1974) 57a

– 31 U.S.C. §463 . . . . . 58a

– Pub. L. No. 95-147, 91 Stat. 1227 (1977) 59a

– Pub. L. No. 97-258, 96 Stat. 985 (1982) 62a

– 31 U.S.C. §5112(h) 64a

– 31 U.S.C. §5118(d)(2) 71a

APPENDIX F – Examples Of Corporate Transactions Admitted By Burlington Northern 74a

APPENDIX G – Examples Of Additional Corporate Transactions Submitted By The Bondholders 75a

Page

APPENDIX H:

– Excerpts from Northern Pacific Railway Company General Lien Mortgage, November 10, 1896 . . . . . 77a

– Excerpts from Great Northern Railway Company General Gold Bond Mortgage, January 1, 1921 . . . . . 79a

APPENDIX I – Excerpts from May 14, 1981 Burlington Northern Railroad Company to Bankers Trust Company Supplemental Indenture to Northern Pacific Railway Company Prior Lien Mortgage of November 10, 1896 . . . . . 81a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35461

D.C. No.
CV-93-01590-WLD

GUY ADAMS; BONNIE L. ADAMS; TIMOTHY ADAMS; CLIFTON ALBRIGHT; JANET ALLOT, et al; MARVIN KLEIN; MARY LOU MILLER; DWIGHT W. WILLIAMS; JO ANN PETERSON; IGNACIA FUENTES; RUSSEL PETERSON; JANET PETERSON; CENTRAL LIFE ASSURANCE CO.,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation; BURLINGTON NORTHERN, INC., a Delaware Corporation,

Defendants-Appellees.

Appeal from the United States District Court
Western District of Washington
William L. Dwyer, District Judge, Presiding

OPINION

No. 94-35618

D.C. No.
CV-93-1827-JCC

GUY D. ADAMS; HERB BAILEY; BARNTS MEDICAL SPECIALTIES; BENEFIT TRUST LIFE INSURANCE CO.; TOM BRADLEY; DONALD L. BROOKHART; CENTRAL LIFE ASSURANCE CO.; RUSSEL L. CLARK; DMN, INC.; RAY EIFORD; SHERMAN A. HILL; BRYCE A. JAMES; FRANK C. JONES; ALAN RUSSELL KAHN; ROBERT M. KEENHOLTS; MANHATTAN LIFE INSURANCE COMPANY; STANDARD INSURANCE COMPANY; ELLIS R. STANLEY; TRUSTMARK LIFE INSURANCE COMPANY; UNION CENTRAL LIFE INSURANCE CO.; IRENE E. WALTERS; WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY; JOHN H. ZYBURA,
on their own behalf and on behalf of and as
Class representatives of
all other persons similarly situated,

Plaintiffs-Appellants,

v.

CSX TRANSPORTATION, a Virginia corporation,

Defendant-Appellee.

Appeal from the United States District Court
Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
September 14, 1995 – Seattle, Washington

Filed April 10, 1996

Before: Arthur L. Alarcon and William C. Canby, Circuit Judges, and James M. Fitzgerald,* District Judge.

Opinion by Judge Canby

COUNSEL

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OPINION

CANBY, Circuit Judge:

These cases arise from the efforts of bondholders to enforce "gold clauses" in railroad bonds issued almost a century ago. A gold clause requires payment of the bond's obligations in gold dollars valued at the time the obligation was undertaken. In 1933, Congress rendered such gold clauses unenforceable, 48 Stat. 112, 113 (1933), but then permitted them again in 1977, 91 Stat.

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*The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

1227, 1229 (1977). The issues presented here are whether the 1977 legislation revived these ancient gold clauses, and whether various actions of the parties have created new, post-1977 obligations payable in gold. Our answer to both questions is "no."

The bondholders brought a class action to force the Burlington Northern Railroad Company ("Burlington Northern" or "Railroad") to pay the interest and principal of its gold bonds, issued in 1896 and 1921, in gold coin. Class representative Guy Adams appeals the district court's dismissal of the action under Fed. R. Civ. P. 12(b)(6) and 56. Because of the identity of issues in this case and *Adams v. CSX Transportation, Inc.*, No. 94-35618, an appeal from the district court's dismissal of a class action to enforce the gold clauses in CSX Transportation ("CSXT") bonds, we consolidate the cases for purposes of this opinion. This Court has jurisdiction under 28 U.S.C. § 1291. We affirm the decisions of the district court in both cases.

BACKGROUND

In 1896 and 1921, respectively, the Northern Pacific Railway and the Great Northern Railway Company issued millions of dollars in "Gold Bonds" to finance their expansion in the Midwestern and Northwestern states. The bonds each contain a "gold clause," requiring the obligor to pay upon maturity "the [face value number of] Dollars, *gold coin* of the United States of America *of the present* [1896 or 1921] *standard weight and fineness*." The clause also calls for annual interest payments at a rate of between three and four per cent, depending on the issue, to be made "in like gold coin."

Nearly $92 million of the Northern Pacific bonds and approximately $62 million of the Great Northern bonds

remain outstanding. The bonds mature between January 1, 1997 and January 1, 2047. The Burlington Northern became obligor on these bonds in 1970, when Great Northern and Northern Pacific merged into it. Both issues trade on the major exchanges, at prices reflecting the market's belief that the Burlington Northern will continue to pay its obligations in current legal tender, rather than in gold coin of the relevant period. If the method of payment were to return to gold coin, the value of the bonds would increase by up to 2000 per cent.

Since the time the Burlington Northern became the obligor on the bonds, it has undergone a corporate reorganization, in which its name was changed, and several mergers. When it reorganized to effectuate a name change and to create a holding company, the Burlington Northern undertook a Supplemental Indenture under its new name "to authorize the unbroken continuity" of the Railroad's obligations to the bondholders.

After a 1981 merger with the Colorado & Southern Railway, the Railroad undertook another Supplemental Indenture. The Supplemental Indenture subjected the former assets of Colorado & Southern to a lien that the Railroad's mortgage trustee had been required to maintain on certain blocks of stock in order to secure payment on the bonds. The Railroad wanted to free the stock from the lien so that it could cancel the stock. The Railroad issued several other Supplemental Indentures, for the same purpose, after other subsequent mergers. None of the Supplemental Indentures created new debt.

In 1985, the Railroad sought the mortgage trustee's release of its lienhold on 1.9 million acres of undeveloped property that had previously served as partial security for the bond debt. A class of gold bondholders filed an action, with Alan Reivman as class representa-

tive, to prevent the lienhold release. In 1987, the Railroad negotiated a settlement with the bondholders (the "Reivman Settlement"), paying the class $35.5 million in exchange for their agreement to drop the action and cease opposition to the release. The settlement did not purport to create new bond obligations.

The CSXT bonds at issue in *Adams v. CSX Transportation, Inc.* have a history similar to the Railroad bonds. In 1899, the Columbus, Hocking Valley & Toledo Railway Company issued $20 million in bonds containing gold clauses that governed payment of the interest and the principal. In 1930, Hocking Valley merged into the Chesapeake & Ohio Railway ("C & O"). In 1987, C & O and CSXT, both of which were wholly owned by the CSX Corporation, merged, leaving CSXT as the surviving entity. CSXT executed a Supplemental Indenture in satisfaction of the original Hocking Valley Mortgage Agreement's requirements, in which it agreed to "assume the due and punctual payment of the principal and interest of all the Bonds issued under [Hocking Valley's first mortgage] according to their tenor . . . ." Approximately $15.8 million of the original Hocking Valley Bonds remain outstanding.

In 1933, Congress passed a Joint Resolution ("the 1933 Statute") providing that any obligation containing a gold clause "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." Ch. 48, 48 Stat. 112, 113 (1933) (formerly codified at 21 U.S.C. § 463). The statute gave the obligor the option of paying its debts in any form of legal tender, including gold, and prevented any obligee from enforcing gold clauses in existing or future obligations. The Gold Reserve Act of 1934, however, foreclosed the obligor's

option of paying in gold by banning the use of gold as legal tender. *See* Gold Reserve Act of 1934, ch. 6, 48 Stat. 340 (1934) (repealed). From 1933 forward, the railroads made the interest payments on their bonds in currency.

In 1977, Congress amended the 1933 Statute by providing that it did "not apply to obligations issued on or after the date of enactment of this section." 91 Stat. 1227, 1229 (1977). The 1933 statute and its amendment were then recodified in 1982 as follows:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

31 U.S.C. § 5118(d)(2). In 1985, Congress reauthorized the use of gold coin as legal tender when it provided for the minting of $50 "Gold Eagle" coins. *See* Gold Bullion Coin Act of 1985, Pub. L. No. 99-185, 99 Stat. 1177 (codified as amended at 31 U.S.C. § 5112 (1994)).

Adams filed these two class actions in the district court in 1993. In *Adams v. Burlington Northern Railroad*, No. 94-35461, Adams sought a declaration that the original terms of the bonds, requiring payment of annual interest and principal at maturity in gold coin of the time (1896 and 1921), are enforceable. Adams also sought damages accruing from the Railroad's failure to pay interest in gold coin from the time any new obligations issued, as determined by the court, to the present. The district court dismissed the action for failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6), and found that the Railroad also had met its burden

for a grant of summary judgment under Fed. R. Civ. P. 56.

Adams brought his second class action, *Adams v. CSX Transportation, Inc.*, No. 94-35618, on behalf of all Hocking Valley gold bondholders. He sought a declaration that CSXT must make all future interest and principal payments in gold coin of the time (the year 1899) and damages for CSXT's failure to pay interest in gold from the time of the 1987 merger with C & O until the time of the judgment. The district court dismissed Adams' action for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Adams appeals from the district court's dismissal of his claim and summary judgment against him in his action against the Burlington Northern, and from the district court's dismissal of his action against CSXT.

ANALYSIS

I. *Adams v. Burlington Northern Railroad*

A. Standard of Review

Adams contends that the district court's dismissal of his claim under Fed. R. Civ. P. 12(b)(6) was improper because the court considered material beyond the pleadings, and that the Railroad's motion should have been treated as a Rule 56 motion for summary judgment. We assume for purposes of decision that the district court entered summary judgment, and affirm on that basis. We review summary judgments de novo, viewing the evidence in the light most favorable to the non-moving party, to determine whether there are any genuine issues of material fact and whether the district court correctly

applied the relevant substantive law. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 1996 WL 115524 (1996).

B. The 1933 Statute and the 1977 Amendment.

Adams contends that the district court erred in determining that the 1933 Statute continues to render unenforceable gold clauses embodied in obligations issued before October 27, 1977. We reject that contention.

As now codified, the 1933 statute and its 1977 amendment are clear on their face.[1] Obligations payable in gold are discharged by payment in any United States legal tender, but that command does not apply to obligations issued after October 27, 1977.

The legislative history of the 1977 amendment supports this plain meaning. Senator Helms, sponsor of the bill amending the 1933 Statute, stated that the bill would "make enforceable, gold clause contracts entered into after the enactment of the bill. It is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past." 123 Cong. Rec. 633, 635 (1977). Senator Helms was aware of pending cases which were to decide the amendment's effect on pre-1933 gold bonds, and he stated his intent to allow courts to resolve that issue. *See id.* Almost immediately, one of the gold clauses in issue in this case was held unenforceable in *Feldman v. Great Northern Ry. Co.*, 428 F.Supp. 979 (S.D.N.Y. 1977). *Feldman* held that gold bonds issued prior to 1933 still could be paid "dollar for dollar, in

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[1]The 1933 statute and the 1977 amendment were equally clear as separately enacted; the 1982 recodification was not intended to effect any substantive changes. *See* H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1895-98.

legal tender of the United States," and need not be paid in gold. *Id.* at 987.

According to Adams, the 1933 Act (at least when combined with the 1934 abolition of gold as legal tender) created an impossibility defense to the payment of gold to the bondholders. He argues that the 1977 Amendment and the 1985 Act authorizing the use of gold as legal tender removed this "impediment," reviving the Railroad's obligations. This interpretation conflicts with the plain meaning of the 1933 statute. That statute does not simply forbid payment in illegal tender, it affirmatively authorizes payment in any tender legal at the time of payment. Indeed, gold was legal tender in 1933 and did not become illegal until enactment of the Gold Reserve Act of 1934, 48 Stat. 337, 340 (1934). The 1985 statute removes the barrier of the 1934 Act, but it does nothing to impair the 1933 statute. The effect of the 1985 statute is to permit the Burlington Northern to make payment in gold coins if it wishes to, but its debts are discharged if it pays in any legal tender. Section 5118(d)(2) so states.

C. Adams' Claim that the Bonds Were Issued After October 27, 1977.

Adams argues, in the alternative, that for purposes of the 1977 amendment the Railroad bonds were "issued" after October 27, 1977. He contends that sale and transfer of the bonds, as well as certain business transactions and reorganizations, such as mergers and a change in the security for the bond debt, effected a new issuance of bonds after 1977. Adams' claim raises a question of statutory interpretation regarding the meaning of the term "issued" in the 1977 Amendment.

The 11th Circuit has held that a lease obligation is "issued" within the meaning of the 1977 amendment when the lease is "entered into." *Rudolph v. Steinhardt*, 721 F.2d 1324, 1330 (11th Cir. 1983); *see also* 123 Cong. Rec. 635 (1977). In the context of bonds, the term has a similar and even better-understood meaning. A bond obligation is "entered into," or "issued" when the bond first "comes into the hands of a holder, so executed and delivered as to bind the obligor." 6A Fletcher Cyc. Corp. § 2688 (1989). While the "date of issue . . . usually means the arbitrary date fixed as the beginning of the term for which [the bonds] run," "in the sense in which the term [issued] is ordinarily used a bond is not issued until it is delivered to some one who claims it as a debt against the corporation." *Id.* Under Article 3 of the Uniform Commercial Code, which covers negotiable instruments, "an issue means the *first delivery* of an instrument to a holder or remitter." *Id.* Article 3 of the Uniform Commercial Code applies by analogy to bonds. *Id.* We adopt this interpretation and hold that bonds are "issued" within the meaning of the 1977 amendment when they are delivered to the first holder.

The Alaska Supreme Court has interpreted the meaning of "issued" in the 1977 Amendment in accordance with this ordinary understanding of the term. *See Gold Bondholders, Etc. v. Atchison, Topeka & Santa Fe Ry. Company*, 649 P.2d 947 (Alaska 1982). *Gold Bondholders* was an action brought by persons who in 1980 had purchased railroad bonds with gold clauses. *Id.* at 948. The railroad had originally issued the bonds in 1895. *Id.* The bondholders argues that the bonds had not been "issued" to them until they were delivered to them in 1980, so that the 1933 Act and 1977 amendment did not prevent them from enforcing the gold clauses. *Id.* 1t

950. The Alaska Supreme Court held that the gold clauses were unenforceable under the 1933 Act, explaining that it "[knew] of no authority which would consider each purchase of the bond after its first purchase to be a new issue of the bond." *Id.*[2]

Taking a different tack from that of the plaintiffs in *Gold Bondholders,* Adams frames his argument in terms of novation, arguing that new obligations to pay in gold arose after October 27, 1977. He argues that because a novation may result from the agreed substitution of an obligee on indebtedness, novations and, consequently, new issuances, occurred each time gold bonds were purchased and sold. This argument misunderstands the requirements for a novation,[3] and is inapposite in the context of bond obligations. Adams' novation argument is essentially the same as the argument that the Alaska Supreme Court rejected, and that we also reject for the same reasons. The date of issue of bonds is the date when they are *first* issued, not when they are resold.

Adams argues that novations also occurred when the Railroad undertook a Supplemental Indenture after a corporate reorganization in which it changed its name, and when it undertook Supplemental Indentures after

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[2]The bonds at issue in *Gold Bondholders* contained terms stating that the bonds were transferable, and that any purchaser could surrender the bond and that "a new registered bond will be issued to the transferee in exchange therefor." *Id.* The Alaska Supreme Court nonetheless found that the 1933 Act was intended to vitiate such obligations "insofar as they required payment in gold specie," and was unpersuaded that the bonds were first issued to the bondholders in 1980. *Id.* at 950-51.

[3]Novations generally require that the parties intend to extinguish the old obligation and to create a new obligation. 66 C.J.S. *Novation,* § 11(b)(1). *See also MacPherson v. Franco,* 208 P.2d 641, 642 (Wash. 1949).

several other mergers, some of which involved the substitution of different collateral to secure the debt. In support of his argument, Adams points to cases in which novations rendered gold clauses in leases enforceable. *See, e.g., Wells Fargo bank v. Bank of America*, 38 Cal. Rptr.2d 521 (App. 1995); *Fay Corp. v. BAT Holdings I, Inc.*, 646 F.Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990).

Our response to this argument is much the same as our response to the contention that the sale of a bond constitutes a novation and new "issue." The date of issue of a bond is the date of first issue; the fact that the obligor has continued to be bound, or has agreed to continue to be bound, despite reorganizations and mergers, does not alter the controlling first issue date. Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue. *See Wells Fargo*, 38 Cal. Rptr.2d at 528 n.5 (stating that novation doctrine applicable to leases would not apply to bonds). For purposes of the 1977 amendment, determinations regarding the issuance date of a bond should "[focus] on the legal structure of the bonds and not novation." *Id.* (citing *Gold Bondholders*, 649 P.2d at 950).

If either the sale of bonds, or the merger of the obligor with an agreement to honor outstanding bonds, were to effectuate a new issue of the bonds, the prospective nature of the 1977 amendment would be almost entirely defeated in the major area of corporate bonds. It was the intent of the 1977 amendment to remain "neutral" concerning bonds issued prior to 1977, not to render virtually all of them payable in gold, which would be the effect were Adams' doctrine of novation applied to bond obligations. Moreover, the issuance of corporate bonds

is subject to a well-developed, specialized body of law, and the general law of novation is not easily injected into that context. Although sometimes described as a specific type of contract, bonds are financial instruments inherently different from leases, which were at issue in the cases that Adams cites. Bonds are regularly sold and purchased in large, impersonal markets, by corporations that frequently undergo corporate changes, while leaseholds generally involve a small number of readily ascertainable and stable parties who can engage in the type of bargaining and mutual consent necessary for a novation. *See* 66 C.J.S. *Novation* § 8(b) (1950) ("the same parties necessary for the making of the original contract are essential to the making of the contract of novation"); *see generally*, 66 C.J.S. *Novation* §§ 8-21 (1950). We are unable to accept the view that Congress intended to alter so radically the obligations of bonds that have been in public circulation for nearly a century, when the language and history of its amendment suggests a contrary purpose. We conclude that none of the theories of novation advanced by Adams are sufficient to cause us to recede from the view that the Railroad's bonds were "issued" on the date of first issue, in 1896 or 1921, as the case may be.[4] They consequently are subject to the 1933 statute and may be paid with any legal tender.

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[4]Even if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation. Under Washington law, which applies in this case, a novation requires the substitution of a new obligation for an old one, and not merely of a new paper or note. *Davis v. Gutheil*, 152 P. 14, 16 (Wash. 1915). All of these Supplemental Indentures expressly indicated a continuity of the original obligations to the bondholders, the old obligations were never extinguished, and no new obligor was substituted.

Adams also contends that the Reivman Settlement constituted a novation. Again, there was no new bond issuance because the Railroad did not undertake any new debt obligation.

D. Adams' Additional Claims

Adams also contends that the 1933 Statute was unconstitutional. This issue has been litigated repeatedly and resolved; Congress's abrogation of the gold clauses was constitutional. *See Norman v. B. & O. R.R. Co.*, 294 U.S. 240, 316 (1935) (finding that Congress acted within the scope of its Constitutional powers in enacting the 1933 Statute); *Guaranty Trust Co. v. Henwood*, 307 U.S. 247, 259 (1939) (holding that the 1933 Statute did not offend the Fifth Amendment); *Feldman v. Great N. R.R.*, 428 F.Supp. 979, 982, 984 (1977) (holding that the 1933 Statute still applied even after the emergency prompting it had abated).

Adams' argument regarding the Railroad's breach of an implied duty of good faith and fair dealing is misguided. The 1933 Act authorized the Railroad to discharge its bond obligations by payment of any legal tender; it did not create an "impediment" to payment which the Railroad had any good faith obligation to avoid. The Railroad was legally excused from meeting its original obligations under the gold clauses and remains so.

We have reviewed Adams' other arguments and find them to be without merit. We affirm the district court's judgment dismissing Adams' action against the Burlington Northern. Adams did not demonstrate that there are any disputed issues of material fact regarding whether the Railroad's bonds were first issued in 1896 and 1921, respectively. Nor did Adams demonstrate that additional discovery could lead to evidence raising a triable issue.

II. *Adams v. CSX Transportation, Inc.*

We review de novo the district court's Fed. R. Civ. P. 12(b)(6) dismissal of Adams' suit against CSXT. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995).

Adams' claim against CSXT fails for the same reasons as his suit against the Railroad. There was only one issuance of Hocking Valley bonds, at the time of their sale in 1899. These original debt obligations continued, and were assumed in their entirety, by CSXT. The original Hocking Valley Indenture specified that in the event of a merger the successor corporation would assume the same obligation as the original obligor. No new debt was created, and the only relevant "obligation" for purposes of the 1977 Amendment was that which arose upon the issuance of the Hocking Valley bonds in 1899.

The 1933 Act bars the enforcement of the gold clauses in the CSXT bonds. We thus affirm the district court's dismissal of Adams' claim for failure to state a claim.

CONCLUSION

We affirm the district court's dismissal of Adams' claims in both *Adams v. Burlington Northern Railroad*, No. 94-35461, and *Adams v. CSX Transportation, Inc.*, No. 94-35618, because the gold bonds in both cases were "obligations issued" prior to October 27, 1977. Accordingly, the 1933 Act bars the bondholders from enforcing the gold clauses against the obligors.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C93-1590WD

GUY AND BONNIE L. ADAMS, et al.,
Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, et al.,
Defendants.

ORDER OF DISMISSAL

For the reasons stated in open court at the conclusion of the hearing held on April 11, 1994, defendants' motion for dismissal under Fed. R. Civ. P. 12(b)(6) is granted; the alternative motion for summary judgment of dismissal under Fed. R. Civ. P. 56(b) is also granted; and this action is dismissed.

The clerk is directed to send copies of this order to all counsel of record.

Dated: April 11, 1994.

/s/
William L. Dwyer
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Case Number C93-1590WD

GUY AND BONNIE L. ADAMS, et al.,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendants' motion for dismissal under Fed. R. Civ. P. 12(b)(6) and alternative motion for summary judgment under Fed. R. Civ. P. 56(b) having been granted, judgment of dismissal is hereby entered.

Date: April 11, 1994

BRUCE RIFKIN
Clerk

Mary Duett
(By) Deputy Clerk

APPENDIX C

[Filed November 15, 1993]

Camden M. Hall
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C93-1590

GUY and BONNIE L. ADAMS; TIMOTHY ADAMS; CLIFTON ALBRIGHT; JANET ALLOTT; ATWOOD-HINZMAN INC. PROFIT SHARING PLAN; VIVIAN AUDETT; HERB and BETTY BAILEY; BARNTS MEDICAL SPECIALITIES; ANNE BOWERS; TOM BRADLEY; ROBERT BRANDT, JR.; DONALD BROOKHART; BRIAN CATHCART; FRANK CATHCART; CENTRAL LIFE ASSURANCE COMPANY; E. WILLIAM and MARLENE CHADDERTON; KENNETH CHUN; VIVIAN CHAN CHUN; KENNETH COLLARD; KAREN DAVIS; CLIFFORD DAVIDSON; CHARLOTTE DE METRY; WAYNE DEMEESTER; DAPHNE DEMETRY; DMN, INC.; DAVID DRIVER; MARVIN DZIABIS; RAY EIFORD; ELJIM COMPANY; ALBERT EVERETT; BRUCE FEARING; JOYCE FEARING; FIRST COLONY LIFE INSURANCE

COMPANY; RONALD FRAME; IGNACIA FUENTES; JANET GRATZER for Candace M. and Melanie A. Waiss; PETER and JANET E. GRATZER; FRANK GREEN; MAURICE HAGEN; BEN HANICH; FRANCIS HARTHORNE; SIEGFRIED HARTMANNS; LEE and ANNE HEINZINGER; M. HEINZINGER; WILLIAM R. and DELTA M. HELBIG, SR.; A. SHERMAN HILL; BRENT JAMES; BRYCE JAMES; CLIFFORD JAMES; LAUREL JAMES; GORDON JONES; RICHARD and MARNAE G. JONES; ALAN KAHN; ROBERT KEENHOLTS; CHARLES and CAROL KELTCH; MARVIN KLEIN; RALPH KLINGSHIRN; RICHARD KNUDSON; KERRIE ELIZABETH KNUTZEN TRUST, Gerald C. Knutzen, Trustee; KNUTZEN GRANDCHILDREN TRUST, Gerald C. Knutzen, Trustee; RAYMOND LOCK; MANHATTAN LIFE INSURANCE COMPANY; BERNARDA MANNING; ALBERT MILLER; MARY LOU MILLER; NAVY MUTUAL AID ASSOCIATION; JOHN NELSON; EUGENE ORRICO; MARK and SUSIE OVERBYE; JIM PARRIOTT; S. PERKINS; JOANN PETERSEN; RUSSEL and JANET PETERSON; JOSEPH PIGNATARO; NEIL PLUMLEY; ROBERT N.H. POOLE; RICHARD RALSTON; RICHARD RAU; RIBOB COMPANY; THEODORE ROBINSON, S & M SAKAMOTO PROFIT SHARING PLAN; WILLIAM SCROUP; SECURITY MUTUAL LIFE INSURANCE COMPANY; FRED and CELIA SEELIG; KEN SIMON; HAROLD STACK; ELLIS STANLEY; MICHAEL and DANNA K. STEWART; ROBERT and MERRILY STEWART; SUPER JOCK 'N JILL, INC.; DEAN and SHARON SUZUKI; JAMES and YURI SUZUKI; DMYTRO and ROMAYNE SZWAYKA, JR.; WILLIAM TAFT; JAMES and SANDRA THOMAS; ALBERT and MARY ANN TORRICO; TRUSTMARK LIFE INSURANCE COMPANY; IRENE WALTERS;

RICHARD WELSH; NANCY WIGGEN; LOIS WILLIAMS; HERMAN WOODCOCK; WOODMEN OF WORLD LIFE INSURANCE COMPANY; GLENN E. WRIGHT; JOHN ZYBURA,

On their own behalf and on behalf of and as Class Representatives of all other persons, similarly situated,

Plaintiffs,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, and BURLINGTON NORTHERN, INC., a Delaware corporation,

Defendants.

COMPLAINT – CLASS ACTION
JURY TRIAL DEMANDED

Plaintiffs allege:

JURISDICTION

1. *Diversity Of Citizenship And Federal Question.* This Court has original jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1332 by reason of a federal question arising under United States statutes and diversity of citizenship between parties. The amount in controversy exceeds $50,000.

2. *Supplemental Jurisdiction.* Because the Court possesses original jurisdiction over plaintiffs' claims, the Court also has supplemental jurisdiction over plaintiffs'

state law claims pursuant to 28 U.S.C. § 1367. Plaintiffs' state law claims and federal question claims are so related as to form part of the same case or controversy.

VENUE

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(c) because defendants Burlington Northern Railroad Company and Burlington Northern, Inc. maintain offices in Seattle, Washington, are licensed to do business in the state of Washington, and are conducting business in the western district of the state of Washington.

PARTIES

4. *Plaintiffs.* Plaintiffs are holders of one or more of the following series of bonds issued by Northern Pacific Railway Company ("Northern Pacific") in 1896 or the Great Northern Railway Company ("Great Northern") in 1921:

(a) Northern Pacific 100-year Railway and Land Grant Gold Bonds, with a maturity date of January 1, 1997 and paying quarterly interest at four percent annually;

(b) Northern Pacific 150-year General Lien Railway and Land Grant Gold Bonds, with a maturity date of January 1, 2047 and paying quarterly interest at three percent annually;

(c) Great Northern General Mortgage Series O. Gold Bonds, with a maturity date of January 1, 2000, and paying semi-annual interest at 3.125 percent annually; and

(d) Great Northern General Mortgage Series Q, Gold Bonds, with a maturity date of January 1, 2010, and paying semi-annual interest at 2.625 percent annually.

(These bonds are collectively referred to in this Complaint as the "Gold Bonds".) Attached and incorporated in this Complaint as Exhibit A is a listing of the plaintiffs' names, residences or office locations, and principal amounts of their holdings of the Gold Bonds.

5. *Defendants.* Burlington Northern Railroad Company and Burlington Northern, Inc., are Delaware corporations with their principal place of business in Ft. Worth, Texas. (Burlington Northern Railroad Company and Burlington Northern, Inc., are referred to collectively in this Complaint as "Burlington Northern".) Burlington Northern is licensed to do business in the state of Washington and is doing business within the state of Washington. Burlington Northern is the successor in interest to Northern Pacific and Great Northern and is the current obligor under the Gold Bonds.

CLASS ACTION ALLEGATIONS

6. Plaintiffs bring all claims in this action individually and as class claims pursuant to Rule 23 of the Federal Rules of Civil Procedure. The requirement of subparts 23(a) and 23(b)(1), (b)(2) or (b)(3) are met.

7. Plaintiffs bring this action on behalf of all persons or entities (or their successors in interest) that are holders of Gold Bonds, excluding those bonds held by Burlington Northern in its treasury.

8. The class representatives believe the class consists of hundreds of geographically dispersed bondholders. The members of the class are so numerous that joinder of all members is impractical. The exact number and identity of class members can be determined by appropriate discovery.

9. There are questions of law or fact common to the class, including at least the following:

a. Are defendants obligated to pay principal and interest in gold as a result of the legislative enactments reviving gold clauses in contracts?

b. Did defendants explicitly or implicitly undertake new obligations under the Gold Bonds as a result of their mergers or consolidations?

c. Did defendants explicitly or implicitly undertake new obligations under the Gold Bonds as a result of plaintiffs' purchase, and defendants' sale, of the Gold Bonds?

d. Did defendants undertake new obligations under the Gold Bonds as a result of the settlement in *Rievman v. Burlington Northern Railroad Co.*?

e. To the extent the Gold Clause Resolution (31 U.S.C. § 463) retains any viability, is it presently constitutional as applied to plaintiffs' Gold Bonds?

f. Have defendants breached contractual obligations to make payment to plaintiffs of principal and interest in gold?

g. Have defendants breached implied covenants of good faith and fair dealing by failing to make payments to plaintiffs of principal and interest in gold?

h. Have defendants been unjustly enriched by failing to make payments to plaintiffs of principal and interest in gold?

10. Plaintiffs have the same interests in this matter as all other members of the class, and their claims are typical of all members of the class.

11. Plaintiffs are committed to pursuing this action and have retained competent counsel experienced in class actions and complex litigation. Plaintiffs will fairly and adequately represent the interests of the class members.

12. The prosecution of separate actions by members of the class will create a risk of establishing incompatible standards of conduct for the defendants. Individual actions may, as a practical matter, be dispositive of the interests of the class.

13. Defendants' actions are generally applicable to the class as a whole, and plaintiffs seek, among other things, equitable remedies with respect to the class as a whole.

14. The common questions of law and fact set forth above predominate over questions affecting only individual members of the class, and a class action is the superior method for fair and efficient adjudication of the controversy. The likelihood that individual members of the class will prosecute separate actions is remote due to the time and expense necessary to conduct such litigation. In addition, if individual actions are prosecuted, they will impose a considerable burden on the courts. To plaintiffs' knowledge, no similar litigation is currently pending by other members of the class. Plaintiffs' counsel foresee little difficulty in the management of this case as a class action.

NATURE OF ACTION

15. *Enforcement Of Gold Clauses.* In summary, in this lawsuit, plaintiffs seek enforcement of the Gold Bonds according to their terms. Specifically, plaintiffs seek enforcement of the "gold clauses" contained in the Gold Bonds; *i.e.*, the obligor's promise to pay principal and interest in gold coin (or its equivalent) of the United States of America of the standard weight and fineness on November 10, 1896, as to the Northern Pacific Bonds, and on July 1, 1921, as to the Great Northern Bonds. In 1933, the obligor's promise to pay under the gold clauses was impeded by enactment of a Congressional resolution.

However, as a result of further events and Congressional actions, any and all impediments to the obligor's promise to pay under the gold clauses have now been removed. Despite the removal of these impediments, the obligor—Burlington Northern—has refused and affirmatively avoided its obligation to pay in gold.

16. *Issuance Of Gold Bonds.* In 1896-1897, Northern Pacific issued Prior Lien Mortgage Bonds (with four percent interest on the principal) and General Lien Mortgage Bonds (with three percent interest on the principal) (in the aggregate principal amount of approximately $186 million) to finance the construction of railroad and telegraph lines throughout the Midwest and Northwest. Ninety-two million dollars of the Northern Pacific bonds remain outstanding. In 1921 Great Northern issued General Mortgage Gold Bonds: Series O (with 3.125 percent interest on the principal) and Q (with 2.625 percent interest on the principal) (in the aggregate principal amount of approximately $70 million) to finance the construction of railroad lines and retire debt. Sixty-two million dollars of the Great Northern Bonds remain outstanding. A copy of a representative Prior Lien Mortgage Bond is attached and incorporated in this Complaint as Exhibit B. A copy of a representative General Lien Mortgage Bond is attached and incorporated in this Complaint as Exhibit C. Copies of representative Series O and Series Q Bonds are attached and incorporated in this Complaint as Exhibits D and E.

17. *Value Of Plaintiffs' Holdings.* The Gold Bonds yield interest to maturity at their individual described interest rate. In addition, plaintiffs hold Gold Bonds in the principal amount of $12,095,000.00, consisting of:

a. 4 Percent Northern Pacific Prior Lien Mortgage Bonds in the principal amount of $1,473,000.00;

b. 3 Percent Northern Pacific General Lien Mortgage Bonds in the principal amount of $4,710,000.00;
c. 3.125 Percent Great Northern Series O Bonds in the principal amount of $1,608,000.00; and
d. 2.625 Percent Great Northern Series Q Bonds in the principal amount of $4,304,000.00.

The present market value of gold coins of the weight and fineness required as payment under the terms of the Gold Bonds is approximately $18.00 in United States currency for each dollar obligation under the Gold Bonds. Accordingly, plaintiffs' aggregate holdings are presently worth in excess of $217,710,000.00. The aggregate holdings of all the class members substantially exceed $217,000,000.00.

FACTS

18. *The Gold Clauses.* Under the terms of the Gold Bonds, the obligor of the Northern Pacific Bonds promised to pay principal and interest when due, upon the maturity date, in "gold coin of the United States of America of the present [November 10, 1896] standard of weight and fineness" and quarterly interest, when due, "in like gold coin." The obligor of the Great Northern Bonds likewise promised to pay the bonds ". . . in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed on the first day of July, 1921 . . ." These "indexed" contracts were designed to protect the bondholders against inflation.

19. *Gold Prohibition.* In 1933, soon after the United States had been taken off the gold standard, Congress passed a joint resolution (the Gold Clause Resolution, 31 U.S.C. § 463) which declared gold clauses "against public policy" and provided that any obligation containing a gold clause:

> shall be discharged upon payment, dollar for dollar, in any coin or curren y which at the time of payment is legal tender for public and private debts.

Since gold was no longer "legal tender," gold clauses were payable only dollar for dollar in United States coin or currency. In 1934, Congress enacted the Gold Reserve Act, which banned private ownership and use of gold. This ban remained in effect for nearly forty years.

20. *Revival Of Gold Clauses.* In 1973 and 1974, Congress passed the Gold Ownership Amendments, which repealed the forty-year prohibition on private ownership of gold. In 1977, Congress re-authorized the use of gold clauses for obligations issued after October 27, 1977. The pertinent statute (31 U.S.C. § 5118(d)(2)) provides:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

Finally, in 1985, Congress enacted a statute (31 U.S.C. § 5112(h)) which provides that—for the first time since 1933—U.S. gold coins are "legal tender."

21. *Burlington Northern's Assumption Of Gold Bond Obligations.* In 1970, Northern Pacific, Great Northern and two other railroad companies merged into Burlington Northern. Following the mergers, Burlington Northern became the new obligor under the Gold Bonds.

22. *Revival Of Gold Clause Obligations.* After passage of the various enactments reviving gold clauses, there were no impediments to Burlington Northern's obligation to pay in gold, or its equivalent, under the Gold Bonds. Thus, the gold clause obligations were retroactively

revived or, in the alternative, were revived prospectively. These Gold Bonds are publicly traded and contain on their face when traded the gold clause obligations. Upon each trade, the gold clause obligation is satisfied by Burlington Northern and is transferred and communicated to each new purchaser of the Gold Bonds. However, Burlington Northern refuses to pay its gold bond obligations in gold or in its equivalent value. In addition, in the period after October 27, 1977, certain other events revived Burlington Northern's obligations under the gold clauses, pursuant to 31 U.S.C. § 5118(d)(2); for example:

(a) *Post-October 27, 1977 Mergers.* Since October 27, 1977, Burlington Northern has entered into at least three mergers or consolidations, as part of which Burlington Northern explicitly or implicitly undertook new obligations under the Gold Bonds. These new obligations were substituted contracts and/or novations.

(b) *The Rievman Settlement.* In 1986, Burlington Northern settled a class action lawsuit, entitled *Rievman v. Burlington Northern Railroad Co.*, as part of which Burlington Northern explicitly or implicitly undertook new obligations under the Gold Bonds. The new obligations were substituted contracts and/or novations.

23. *Unconstitutionality Of Gold Prohibition.* To the extent it retains any viability, the Gold Clause Resolution (31 U.S.C. § 463) lacks a rational basis and is unconstitutional. This is because (by way of example and in the alternative to other allegations in this Complaint):

(a) Gold no longer plays a part in our federal monetary system;

(b) In the alternative, gold is a commodity and Congress is not entitled to regulate its value or use; or

(c) The Gold Clause Resolution is an unreasonable infringement on the rights of private citizens, including

the right to protect themselves from inflation through gold index contracts.

24. *Demand On Burlington Northern.* One or more holders of the Gold Bonds has demanded that Burlington Northern make payment of principal and interest on the Gold Bonds in gold. Burlington Northern has refused these demands.

25. *Demand On Trustees.* The trustees under the Gold Bonds are aware of the general substance of the allegations of the preceding paragraphs, since it is of public knowledge. One or more holders of the Gold Bonds has made, or will make, demand upon the trustees under the Gold Bonds to vigorously enforce the rights of the bondholders under the terms of the Gold Bonds. In addition, and arguably in compliance with the terms of the applicable bond indentures, simultaneous with filing this Complaint, plaintiffs' mailed written notice to the trustees of Burlington Northern's default, requested the trustees to prosecute the bondholders' claims, and offered the trustees adequate security against the costs of bringing the bondholders' claims by offering to pursue this class action lawsuit. In light of the trustees' prior knowledge of the revival and validity of the gold clauses and continued failure to take action in the past, further requests to the trustees will be futile.

COUNT I
(DECLARATORY JUDGMENT)

26. *Incorporation.* Plaintiffs restate and incorporate the preceding paragraphs as if fully set forth herein.

27. *Declaratory Judgment.* Plaintiffs request a declaratory judgment under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 that the Gold Bonds, including the gold clauses,

are enforceable and require payment of principal and interest in gold or its equivalent. There exists an actual controversy between the parties on this issue.

28. *Basis For Declaratory Judgment.* The Gold Bonds are enforceable pursuant to their terms. In addition, Burlington Northern has traded in the Gold Bonds and has undertaken new obligations under the Gold Bonds by reason of the trades and the post-October 27, 1977 mergers and consolidations and the *Rievman* settlement. Plaintiffs' request for declaratory judgment is further supported and based upon constitutional provisions and theories, including, but not limited to, implied repeal, coexistence, basic fairness and equity.

COUNT II
(BREACH OF CONTRACT)

29. *Incorporation.* Plaintiffs restate and incorporate the preceding paragraphs as if fully set forth herein.

30. *Contract.* The Gold Bonds constitute an enforceable contract between Burlington Northern and the holders of the Gold Bonds. In 1933, as a result of Congressional resolution, Burlington Northern's obligation to make payments in gold was impeded. Any and all impediments to Burlington Northern's performance of its obligations have now been removed. In addition, Burlington Northern has traded in the Gold Bonds and has undertaken new obligations under the Gold Bonds by reason of the post-October 27, 1977 mergers and consolidations, defendants' sale and plaintiffs' purchase of the Gold Bonds, and the *Rievman* settlement.

31. *Breach.* By continuing its refusal to pay interest and principal in gold, or its equivalent, Burlington Northern has breached its obligations under the Gold Bonds.

32. *Damages.* Plaintiffs have been damaged and continue to be damaged by Burlington Northern's actions.

COUNT III
(BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING)

33. *Incorporation.* Plaintiffs restate and incorporate the preceding paragraphs as if fully set forth herein.

34. *Duty Of Good Faith.* Burlington Northern has the duty, implied in every contract, to deal with the holders of the Gold Bonds fairly and in good faith. By failing to resume payments in gold, or its equivalent, after all impediments of doing so had been removed, Burlington Northern breached its duty of good faith and fair dealing. In the alternative, by taking affirmative steps (in the post-October 27, 1977 mergers and consolidations and by the creation of Burlington Resources, Inc. and in the spin-off of Northern Pacific assets after the *Rievman* settlement) to avoid reviving its obligations under the gold clauses, Burlington Northern breached its duty of good faith and fair dealing.

35. *Damages.* Plaintiffs have been damaged and continue to be damaged by Burlington Northern's actions.

COUNT IV
(UNJUST ENRICHMENT)

36. *Incorporation.* Plaintiffs restate and incorporate the preceding paragraphs as if fully set forth herein.

37. *Benefit Wrongfully Retained.* Burlington Northern benefitted for years as a result of the gold prohibition. After the impediments to payment in gold had been removed, the holders of the Gold Bonds were entitled to receive payment on the Gold Bonds in gold or its equiva-

lent; however, Burlington Northern has wrongfully retained the money and benefits due to the holders of the Gold Bonds. For example, money otherwise due the bondholders was paid to Burlington Northern officers, directors and shareholders; property otherwise held as security for bondholders was distributed to shareholders of Burlington Northern, Inc., by a spin-off of Burlington Resources, Inc.

38. *Damages.* Plaintiffs have been damaged and continue to be damaged by Burlington Northern's actions.

JURY TRIAL DEMAND

39. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, plaintiffs demand a trial by jury.

RELIEF REQUESTED

Plaintiffs request the following relief:

(a) for a judicial declaration that the Gold Bonds are enforceable pursuant to their terms, including payment of interest and principal in gold;

(b) for damages in an amount to be proven at trial;

(c) for pre-judgment and post-judgment interest, costs and attorney fees as allowed by law; and

(d) for such further relief as the Court deems just and equitable.

DATED this 15th day of November, 1993.

FOSTER PEPPER & SHEFELMAN

/s/ Camden M. Hall
Camden M. Hall, WSBA No. 146
Robert A. Medved, WSBA No. 7016
Patrick J. Callans, WSBA No. 19361

Attorneys for Plaintiffs

EXHIBIT A

Guy Adams Bonnie L. Adams	Olympia, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 205,000.00
Timothy Adams	Olympia, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 110,000.00
Clifton Albright	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00
Janet Allott	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Atwood-Hinzman Inc. Profit Sharing Plan	Spokane, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 50,000.00
Vivian Audett	Redmond, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 110,000.00
Herb & Betty Bailey	Centralia, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 40,000.00
Herb & Betty Bailey	Centralia, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 100,000.00

Barnts Medical Specialties Attn: Joyce Barnts	Redmond, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 50,000.00
Anne Bowers	Red Bank, NJ	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 2,000.00
Tom Bradley	Arlington, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 106,000.00
Robert Brandt, Jr.	Valleyford, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 50,000.00
Donald Brookhart	Monroe, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 10,000.00
Donald Brookhart	Monroe, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 110,000.00
Brian Cathcart	Bothell, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 49,000.00
Frank J. Cathcart	Bellevue, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 7,000.00
Central Life Assurance Co Attn: W. K. Gunzenhauser	Des Moines, IA	Great Northern Ry General Mortgage Series Q, 2.625%	$ 50,000.00

Central Life Assurance Co Attn: W. K. Gunzenhauser	Des Moines, IA	Great Northern Ry General Mortgage Series O, 3.125%	$ 425,000.00
E. William Chadderton Marlene Chadderton	Naalehe, HI	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 14,000.00
E. William Chadderton Marlene Chadderton	Naalehe, HI	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Kenneth Chun	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Vivian Chan Chun	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Kenneth Collard	Vancouver, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Clifford Davidson	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 37,000.00
Karen Davis	Maple Valley, WA	NorthernPacific Ry General Lien & Land Grant 3%	$ 80,000.00
Charlotte De Metry	Oroville, CA	Northern Pacific Ry General Lien & Land Grant 3%	$ 100,000.00

Wayne Demeester	Redmond, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 15,000.00
Daphne Demetry	San Diego, CA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
DMN, Inc. Donald Newton	Redmond, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 59,000.00
David Driver	Seattle, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 10,000.00
Marvin Dziabis	N. Manchester, IN	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Ray Eiford	Bellingham, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 140,000.00
ELJIM Company Mr. Robert Elmen	Sioux Falls, SD	Northern Pacific Ry General Lien & Land Grant 3%	$ 250,000.00
Albert Everett	Woodinville, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 10,000.00
Bruce Fearing	Kent, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00

Joyce Fearing	Kent, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
First Colony Life Insurance Company Attn: J. Alden Butler	Lynchburg, VA	Great Northern Ry General Mortgage Series Q, 2.625%	$2,155,000.00
Ronald Frame	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 45,000.00
Ignacia Fuentes	Truchas, NM	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Janet Gratzer Candace M. & Melanie A. Waiss	Puyallup, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00
Peter Gratzer Janet E. Gratzer	Puyallup, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00
Frank Green	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Maurice Hagen	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 17,000.00

Ben Hanich	Edmonds, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Francis Harthorne	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 50,000.00
Siegfried Hartmanns	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00
Lee & Anne Heinzinger	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 147,000.00
M. Heinzinger	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 60,000.00
William R. Helbig, Sr. Delta M. Helbig, TIC	Honolulu, HI	Northern Pacific Ry General Lien & Land Grant 3%	$ 100,000.00
A. Sherman Hill	Yakima, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 80,000.00
Brent James	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00
Bryce James	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 81,000.00

Clifford James	Merced, CA	Northern Pacific Ry General Lien & Land Grant 3%	$ 40,000.00
Laurel James	Seattle, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 7,000.00
Laurel James	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 40,000.00
Gordon Jones	Bellingham, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 90,000.00
Richard Jones Marnae G. Jones	Bothell, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Alan Kahn	Forest Hills, NY	Northern Pacific Ry General Lien & Land Grant 3%	$ 100,000.00
Robert Keenholts	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 40,000.00
Robert Keenholts	Seattle, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 10,000.00
Charles Keltch Carol Keltch	Pasco, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 40,000.00

Marvin Klein	Mountain View, CA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 10,000.00
Ralph Klingshirn	Bothell, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Richard Knudson	Tacoma, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Knutzen Grandchildren Trust Gerald C. Knutzen, Trustee	Federal Way, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 135,000.00
Kerrie Elizabeth Knutzen Trust Gerald C. Knutzen, Trustee	Federal Way, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 15,000.00
Raymond Lock	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Manhattan Life Ins. Co. Attn: James J. Breen	Cincinnati, OH	Great Northern Ry General Mortgage Series Q, 2.625%	$ 335,000.00
Manhattan Life Ins. Co. Attn: James J. Breen	Cincinnati, OH	Great Northern Ry General Mortgage Series O, 3.125%	$ 553,000.00
Manhattan Life Ins. Co. Attn: James J. Breen	Cincinnati, OH	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 750,000.00

Bernarda Manning	Tacoma, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 60,000.00
Albert Miller	Redmond, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 90,000.00
Mary Lou Miller	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 50,000.00
Navy Mutual Aid Assn. Attn: A. C. Drewry	Washington, DC	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 200,000.00
John Nelson	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Eugene Orrico c/o Brian J. Orrico	Kirkland, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 35,000.00
Mark & Susie Overbye	Knoxville, TN	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 20,000.00
Mark & Susie Overbye	Knoxville, TN	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Jim Parriott	Jackson Hole, WY	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00

S. Perkins	Mill Creek, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 40,000.00
JoAnn Petersen	Edmonds, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 40,000.00
Russel & Janet Peterson	Corvallis, OR	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Joseph Pignataro	Edmonds, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 40,000.00
Neil Plumley	Salem, OR	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Robert N. H. Poole	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Richard Ralston	Portland, OR	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Richard Rau	Melrose, FL	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00
RIBOB Company Mr. Robert Elmen	Sioux Falls, SD	Northern Pacific Ry General Lien & Land Grant 3%	$ 250,000.00

Theodore Robinson	Maryville, MO	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 10,000.00
S & M Sakamoto Prof Shar Plan Gerard Sakamoto, Trustee	Pearl City, HI	Northern Pacific Ry General Lien & Land Grant 3%	$ 100,000.00
William Scroup	Sedro Wooley, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Security Mutual Life Insurance Company Attn: William W. Atkin	Binghampton, NY	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 300,000.00
Fred & Celia Seelig	Reno, NV	Northern Pacific Ry General Lien & Land Grant 3%	$ 65,000.00
Ken Simon	Renton, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 50,000.00
Harold Stack Pacific Investment Co.	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 100,000.00
Ellis Stanley	Kirkland, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00

Michael Stewart Danna K. Stewart	Renton, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Robert Stewart Merrily Stewart	Aberdeen, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Super Jock n Jill, Inc. Laurel James, President	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 30,000.00
Dean & Sharon Suzuki	San Leandro, CA	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
James & Yuri Suzuki	Woodinville, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 25,000.00
James & Yuri Suzuki	Woodinville, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 120,000.00
Dmytro Szwayka, Jr. Romayne Szwayka	Lyndhurst, NJ	Northern Pacific Ry General Lien & Land Grant 3%	$ 20,000.00
Dmytro Szwayka, Jr. Romayne Szwayka	Lyndhurst, NJ	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 5,000.00
William Taft	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00

James & Sandra Thomas	Edmonds, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 18,000.00
Albert Torrico Mary Ann Torrico	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00
Trustmark Life Ins. Co. Attn: General Counsel	Lake Forest, IL	Great Northern Ry General Mortgage Series Q, 2.625%	$1,264,000.00
Irene Walters	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 50,000.00
Richard Welsh	Issaquah, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 5,000.00
Richard Welsh	Issaquah, WA	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 5,000.00
Nancy Wiggen	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 45,000.00
Lois Williams	Olympia, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 24,000.00
Herman Woodcock	Creve Coeur, MO	Northern Pacific Ry Prior Lien & Land Grant 4%	$ 5,000.00

Woodmen of World Life Ins. Co.	Omaha, NE	Great Northern Ry General Mortgage Series O, 3.125%	$ 630,000.00
Woodmen of World Life Ins. Co.	Omaha, NE	Great Northern Ry General Mortgage Series Q, 2.625%	$ 500,000.00
Glenn E. Wright	Yellow Springs, OH	Northern Pacific Ry General Lien & Land Grant 3%	$ 10,000.00
John Zybura	Seattle, WA	Northern Pacific Ry General Lien & Land Grant 3%	$ 50,000.00

[BOND EXEMPLARS OMITTED]

APPENDIX D

LYNN M. VOSKUIL,
BURLINGTON NORTHERN INC.,
IN
5 INTERNATIONAL DIRECTORY OF
COMPANY HISTORIES 428
(ADELE HAST, ed., ST. JAMES PRESS 1992)

* * *

In the 1960s CB&Q, the Great Northern, and the Northern Pacific proposed to merge into one corporate entity. Murphy resigned in 1965, before the ICC could rule on the proposal. L. W. Menk succeeded him as president and chairman. In 1966 Menk resigned to become president of Northern Pacific and was succeeded by William J. Quinn.

In 1968 the ICC approved the merger plan under the name Burlington Northern Inc. In March 1970 the three firms and two smaller railroads formally consolidated, and Menk became president and chief operating officer of the new company. Burlington Northern in 1970 sought to acquire the Missouri-Kansas-Texas (Katy) Railroad but subsequently dropped its bid without comment. Industry observers speculated that the Katy's debt load may have discouraged Burlington Northern or that the ICC would have been unlikely to approve the merger.

In the early 1970s Burlington Northern diversified into natural resources management, focusing especially on

coal development. It also added an air freight subsidiary. Management structure changed in the 1970s; Menk became chairman and chief executive officer, with Robert Downing, Norman M. Lorentzsen, and Richard Bressler, serially, filling the dual posts of president and chief operating officer.

In 1972 Burlington Northern and Union Pacific sought joint control of Peninsula Terminal Co., a switching line in Portland, Oregon, but the U.S. Supreme Court reversed the ICC's approval of the plan. The following year brought merger negotiations between Burlington Northern and Chicago, Milwaukee, St. Paul & Pacific Railroad. The ICC rejected this merger plan. In 1980, however, Burlington Northern succeeded in acquiring the St. Louis-San Francisco Railway.

By 1978 the company had record profits, still largely from the railroad division. In 1982 Bressler became chairman, president, and chief operating officer. He streamlined existing operations by selling the air freight unit and unsuccessful segments of the railroad, and by continuing efforts to develop the company's coal, timber, and gas reserves. In 1983 Burlington Northern acquired El Paso Natural Gas Company, a diversified energy concern that specialized in producing natural gas, and in 1985 bought Southland Royal Company, producer of oil and gas. Initially these moves profitably supplemented Burlington's development of resources on its own railroad land. In June 1988, however, the company suddenly reversed its diversification trend and announced the spinoff of the energy resources operation as Burlington Resources Inc., an independent public company. The spinoff enabled Burlington Northern to avoid pending legal claims that remained against the former El Paso Natural Gas Company, which had been sued for breach

of contract, and to recover from falling energy prices. Burlington Motor Carriers Inc., in 1988. The buyer was an investor group that included the subsidiary's top management.

Bressler continued as chairman of Burlington Northern and Burlington Resources, while Gerald Grinstein, who had been vice chairman of both companies, became Burlington Northern's president and chief executive officer in 1989. Bressler retired in 1990, and Grinstein assumed the additional post of chairman. In the early 1990s Burlington Northern was focused on its railroad business, the company's historic strength. It was seeking increased flexibility in its labor contracts in an effort to improve efficiency and was investing in track improvements and new rolling stock.

Principal Subsidiary: Burlington Northern Railroad Co.

APPENDIX E

STATUTES, RULES, CONSTITUTIONAL PROVISION, CONGRESSIONAL PROCEEDINGS

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48 Stat. 112 (1933) (codified at 31 U.S.C. §463)

JOINT RESOLUTION

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of

the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the stand-

ard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4.40 p.m.

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31 U.S.C. §442, 443

§442. Regulations for the acquisition and use of gold; exemption of gold held beyond continental United States.

The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of section 315b, 405b, 408a, 408b, 440 to 446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411 to 415, 417, and 467 of Title 12. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such

regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States. (Jan. 30, 1934, ch. 6, §3, 48 Stat. 340; Proc. No. 2695, 11 F. R. 7517, 60 Stat. 1352.)

REPEALS

All laws inconsistent with the provisions of this section were repealed by section 446 of this title.

CODIFICATION

Words "the Philippine Islands or other" preceding "places beyond" have been omitted on the authority of the Proc. No. 2695, eff. July 4, 1946, which granted independence to the Philippine Islands. 1946 Proc. No. 2695 is set out as a note under section 1394 of Title 22, Foreign Relations and Intercourse.

APPROVAL OF THE PRESIDENT

Power of the Secretary of the Treasury to perform, without the approval, ratification, or other action of the President, the functions vested in him by this section, see Ex. Ord. No. 10289, September 17, 1951, 16 F. R. 9499, set out as a note under section 301 of Title 3, The President.

§443. Acquisition and use of gold in violation of law; penalties.

Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in

custody, in violation of sections 315b, 405b, 408a, 408b, 440 to 446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411 to 415, 417, and 467 of Title 12 or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of said sections or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred. (Jan. 30, 1934, ch. 6, § 4, 48 Stat. 340.)

REPEALS

All laws inconsistent with the provisions of this section were repealed by section 446 of this title.

Pub. L. No. 93-110, 87 Stat. 352, tit. I (1973)

AN ACT

To amend the Par Value Modification Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 2 of the Par Value Modification Act is amended by striking out the words "one thirty-eighth of a fine troy ounce of gold" and inserting in lieu thereof the following: "0.828948 Special Drawing Right or, the equivalent in terms of gold, of forty-two and two-ninths dollars per fine troy ounce of gold".

SEC. 2. The Par Value Modification Act is amended by adding at the end thereof the following new section:

"SEC. 5. It is the sense of the Congress that the President shall take all appropriate action to expedite realization of the international monetary reform noted at the Smithsonian on December 18, 1971."

SEC. 3. (a) Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. 442 and 443) are repealed.

(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order under authority of any such law, may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold.

(c) The provisions of this section, pertaining to gold, shall take effect when the President finds and reports to the Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position.

Pub. L. No. 93-373, 88 Stat. 445 (1974)

AN ACT

To provide for increased participation by the United States in the International Development Association and to permit United States citizens to purchase, hold, sell, or otherwise deal with gold in the United States or abroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the International Development Association Act (22 U.S.C. 284 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 14. (a) The United States Governor is hereby authorized to agree on behalf of the United States to pay to the Association four annual installments of $375,000,000 each as the United States contribution to the Fourth Replenishment of the Resources of the Association.

"(b) In order to pay for the United States contribution, there is hereby authorized to be appropriated without fiscal year limitation four annual installments of $375,000,000 each for payment by the Secretary of the Treasury.".

SEC. 2. Subsections 3 (b) and (c) of Public Law 93-110 (87 Stat. 352) are repealed and in lieu thereof add the following:

"(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order in effect on the date subsections (a) and (b) become effective may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad.

"(c) The provisions of subsections (a) and (b) of this section shall take effect either on December 31, 1974, or at any time prior to such date that the President finds and reports to Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position.".

SEC. 3. The International Development Association Act (22 U.S.C. 284 et seq.) is amended by inserting at the end thereof the following:

"SEC. 15. The United States Governor is authorized and directed to vote against any loan or other utilization of the funds of the Association for the benefit of any country which develops any nuclear explosive device, unless the country is or becomes a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons (21 UST 483)."

Approved August 14, 1974.

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31 U.S.C. §463

§463. Provision for payment of obligations in gold prohibited; uniformity in value of coins and currencies

(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained

in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this section, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.
(June 5, 1933, ch. 48, § 1, 48 Stat. 113.)

Pub. L. No. 95-147, 91 Stat. 1227 (1977)

An Act

To authorize the Secretary of the Treasury to invest public moneys, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized, for cash management purposes, to invest any portion of

the Treasury's operating cash for periods of up to ninety days in (1) obligations of depositaries maintaining Treasury tax and loan accounts secured by a pledge of collateral acceptable to the Secretary of the Treasury as security for tax and loan accounts, and (2) obligations of the United States and of agencies of the United States: *Provided*, That the authority granted under this section shall not be construed as requiring the Secretary of the Treasury to invest any or all of the cash balance held in any particular account: *Provided further*, That the authority granted under this section shall not be construed as permitting the Secretary of the Treasury to require the sale of such obligations by any particular person, dealer, or financial institution. Investments in obligations of depositaries maintaining such accounts shall be made at rates of interest prescribed by the Secretary of the Treasury, after taking into consideration prevailing market rates of interest.

* * *

SEC. 4. (a) The Bretton Woods Agreements Act (22 U.S.C. 286–286K-2) is amended–

(1) by striking out clause (g) of the first sentence of section 5, and by inserting immediately after clause (f) the following: "or (g) approve either the disposition of more than 25 million ounces of Fund gold for the benefit of the Trust Fund established by the Fund on May 6, 1976, or the establishment of any additional trust fund whereby resources of the International Monetary Fund would be used for the special benefit of a single member, or of a particular segment of the membership, of the fund.":

(2) (A) by inserting "(a)" immediately after "SEC. 14."; and

(B) by inserting at the end of section 14 the following new subsection:

"(b) The President shall, upon the request of any committee of the Congress with legislative or oversight jurisdiction over monetary policy or the International Monetary Fund, provide to such committee any appropriate information relevant to that committee's jurisdiction which is furnished to any department or agency of the United States by the International Monetary Fund. The President shall comply with this provision consistent with United States membership obligations in the International Monetary Fund and subject to such limitations as are appropriate to the sensitive nature of the information.".

(b) (1) Section 10(a) of the Gold Reserve Act of 1934 (31 U.S.C. 822a(a)) is amended—

(A) by striking out "to and" immediately following "necessary" and inserting in lieu thereof a comma; and

(B) by inserting immediately after "International Monetary Fund" the following: "regarding orderly exchange arrangements and a stable system of exchange rates: *Provided, however*, That no loan or credit to a foreign government or entity shall be extended by or through such Fund for more than six months in any twelve-month period unless the President provides a written determination to, the Congress that unique or exigent circumstances make such loan or credit necessary for a term greater than six months".

(2) Section 10(b) of the Gold Reserve Act of 1934 (31 U.S.C. 822a(b)) is amended by striking out the phrase "stabilizing the exchange value of the dollar" in the fourth sentence thereof and inserting in lieu thereof the phrase "the purposes prescribed by this section".

(c) The joint resolution entitled "Joint resolution to assure uniform value to the coins and currencies of the United States", approved June 5, 1933 (31 U.S.C. 463), shall not apply to obligations issued on or after the date of enactment of this section.

Approved October 28, 1977.

Pub. L. No. 97-258, 96 Stat. 985 (1982)
(codified at 31 U.S.C. §5118(d)(2))

(c) With the approval of the President, the Secretary may prescribe regulations the Secretary considers necessary to carry out this section.

§ 5118. Gold clauses and consent to sue

(a) In this section—

(1) "gold clause" means a provision in or related to an obligation alleging to give the obligee a right to require payment in—

(A) gold;

(B) a particular United States coin or currency; or

(C) United States money measured in gold or a particular United States coin or currency.

(2) "public debt obligation" means a domestic obligation issued or guaranteed by the United States Government to repay money or interest.

(b) The United States Government may not pay out or deliver any gold coin. A person lawfully holding United States coins and currency may present the coins and currency to the Secretary of the Treasury for exchange (dollar for dollar) for other United States coins and currency that may be lawfully held. The Secretary shall

make the exchange under regulations prescribed by the Secretary.

(c)(1) The Government withdraws its consent given to anyone to assert against the Government, its agencies, or its officers, employees, or agents, a claim—

(A) on a gold clause public debt obligation or interest on the obligation;

(B) for United States coins or currency; or

(C) arising out of the surrender, requisition, seizure, or acquisition of United States coins or currency, gold, or silver involving the effect of validity of a change in the metallic content of the dollar or in a regulation about the value of money.

(2) Paragraph (1) of this subsection does not apply to a proceeding in which no claim is made for payment or credit in an amount greater than the face or nominal value in dollars or public debt obligations or United States coins or currency involved in the proceeding.

(3) Except when consent is not withdrawn under this subsection, an amount appropriated for payment on public debt obligations and for United States coins and currency may be expended only dollar for dollar.

(d)(1) In this subsection, "obligation" means any obligation (except United States currency) payable in United States money.

(2) An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

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31 U.S.C. §5112(h)

§5112. Denominations, specifications, and design of coins

(a) The Secretary of the Treasury may mint and issue only the following coins:

(1) a dollar coin that is 1.043 inches in diameter and weighs 8.1 grams.

(2) a half dollar coin that is 1.205 inches in diameter and weighs 11.34 grams.

(3) a quarter dollar coin that is 0.955 inch in diameter and weighs 5.67 grams.

(4) a dime coin that is 0.705 inch in diameter and weighs 2.268 grams.

(5) a 5-cent coin that is 0.835 inch in diameter and weighs 5 grams.

(6) Except as provided under subsection (c) of this section, a one-cent coin that is 0.75 inch in diameter and weighs 3.11 grams.

(b) The dollar, half dollar, quarter dollar, and dime coins are clad coins with 3 layers of metal. The 2 identical outer layers are an alloy of 75 percent copper and 25 percent nickel. The inner layer is copper. The outer layers are metallurgically bonded to the inner layer and weigh at least 30 percent of the weight of the coin. The 5-cent coin is an alloy of 75 percent copper and 25 percent nickel. In minting 5-cent coins, the Secretary shall use bars that vary not more than 2.5 percent from the percent of nickel required. Except as provided under subsection (c) of this section, the one-cent coin is an alloy of 95 percent copper and 5 percent zinc. The specifications for alloys are by weight.

(c) The Secretary may prescribe the weight and the composition of copper and zinc in the alloy of the one-cent

coin that the Secretary decides are appropriate when the Secretary decides that a different weight and alloy of copper and zinc are necessary to ensure an adequate supply of one-cent coins to meet the needs of the United States.

(d)(1) United States coins have the inscription "In God We Trust". The obverse side of each coin has the inscription "Liberty". The reverse side of each coin has the inscriptions "United States of America" and "E Pluribus Unum" and a designation of the value of the coin. The design on the reverse side of the dollar, half dollar, and quarter dollar is an eagle. The eagle on the reverse side of the dollar is the symbolic eagle of Apollo 11 landing on the moon. The obverse side of the dollar has the likeness of Susan B. Anthony. The coins have an inscription of the year of minting or issuance. However, to prevent or alleviate a shortage of a denomination, the Secretary may inscribe coins of the denomination with the year that was last inscribed on coins of the denomination.

(2) The Secretary shall prepare the devices, models, hubs, and dies for coins, emblems, devices, inscriptions, and designs authorized under this chapter [31 USCS §§5101 et seq.]. The Secretary may adopt and prepare new designs or models of emblems or devices that are authorized in the same way as when new coins or devices are authorized. The Secretary may change the design or die of a coin only once within 25 years of the first adoption of the design, model, hub, or die for that coin. The Secretary may procure services under section 3109 of title 5 [5 USCS § 3109] in carrying out this paragraph.

(e) Notwithstanding section 5111(a)(1) of this title [31 USCS § 5111(a)(1)] and subsections (a) and (b) of this

section, the Secretary may mint and issue not more than 150,000,000 dollar coins that–

(1) are 1.5 inches in diameter and weigh 24.592 grams;

(2) have 2 identical outer layers of an alloy of 80 percent silver and 20 percent copper that are metallurgically bonded to an inner layer of an alloy of silver and copper;

(3) contain 9.837 grams of silver and 14.755 grams of copper;

(4) have the likeness of Dwight David Eisenhower on the obverse side;

(5) have the inscription of a year decided by the Secretary; and

(6) except as provided in this paragraph, have the inscriptions and designs provided for the dollar in subsection (d)(1) of this section.

(f)(1) Notwithstanding this section and section 5111(a)(1) of this title [31 USCS § 5111(a)(1)], the Secretary shall mint and issue, in quantities the Secretary decides are necessary to meet public demand (but not more than 10,000,000), half dollar coins that–

(A) are 30.61 millimeters in diameter and weigh 12.5 grams;

(B) are an alloy of 90 percent silver and 10 percent copper;

(C) have a design on each side of the coin, decided by the Secretary, symbolizing the 250th anniversary of the birth of George Washington; and

(D) have a designation of the value of the coin and an inscription of the year "1982" and the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum".

(2) The Secretary shall sell the coins minted under this subsection to the public at a price equal to the cost of minting and distributing the coins (including labor,

materials, dies, use of machinery, promotion, and overhead expenses) plus a surcharge of not more than 20 percent of the cost. The Secretary shall deposit an amount equal to the surcharge received under this paragraph in the Treasury to be used only to reduce the national debt.

(3) The Secretary may not mint coins under this subsection after December 31, 1983.

(4) Amounts necessary to carry out this subsection may be appropriated.

(Sept. 13, 1982, P. L. 97-258, § 1, 96 Stat. 981; Jan. 12, 1983, P. L. 97-452, § 1(20), 96 Stat. 2477.)

§ 5112. Denominations, specifications, and design of coins

(a) The Secretary of the Treasury may mint and issue only the following coins:

(1)-(6) [Unchanged]

(7) A fifty dollar gold coin that is 32.7 millimeters in diameter, weighs 33.931 grams, and contains one troy ounce of fine gold.

(8) A twenty-five dollar gold coin that is 27.0 millimeters in diameter, weighs 16.966 grams, and contains one-half troy ounce of fine gold.

(9) A ten dollar gold coin that is 22.0 millimeters in diameter, weighs 8.483 grams, and contains one fourth troy ounce of fine gold.

(10) A five dollar gold coin that is 16.5 millimeters in diameter, weighs 3.393 grams, and contains one-tenth troy ounce of fine gold.

(b) The dollar, half dollar, quarter dollar, and dime coins are clad coins with 3 layers of metal. The 2 identical outer layers are an alloy of 75 percent copper and 25 percent nickel. The inner layer is copper. The outer layers

are metallurgically bonded to the inner layer and weigh at least 30 percent of the weight of the coin. The 5-cent coin is an alloy of 75 percent copper and 25 percent nickel. In minting 5-cent coins, the Secretary shall use bars that vary not more than 2.5 percent from the percent of nickel required. Except as provided under subsection (c) of this section, the one-cent coin is an alloy of 95 percent copper and 5 percent zinc. In minting gold coins, the Secretary shall use alloys that vary not more than 0.1 percent from the percent of gold required. The specifications for alloys are by weight.

(c) [Unchanged]

(d)(1) United States coins shall have the inscription "In God We Trust". The obverse side of each coin shall have the inscription "Liberty". The reverse side of each coil shall have the inscriptions "United States of America" and "E Pluribus Unum" and a designation of the value of the coin. The design on the reverse side of the dollar, half dollar, and quarter dollar is an eagle. The eagle on the reverse side of the dollar is the symbolic eagle of Apollo 11 landing on the moon. The obverse side of the dollar has the likeness of Susan B. Anthony. The coins have an inscription of the year of minting or issuance. However, to prevent or alleviate a shortage of a denomination, the Secretary may inscribe coins of the denomination with the year that was last inscribed on coils of the denomination.

(2) [Unchanged]

(e) Notwithstanding any other provision of law, the Secretary shall mint and issue, in quantities sufficient to meet public demand, coins which—

(1) are 40.6 millimeters in diemater and weigh 31.103 grams;

(2) contain .999 fine silver;

(3) have a design—

(A) symbolic of Liberty on the obverse side; and

(b) of an eagle on the reverse side;

(4) have inscriptions of the year of minting or issuance, and the words "Liberty", "In God We Trust", "United States of America", "1 Oz. Fine Silver", "E Pluribus Unum", and "One Dollar"; and

(5) have reeded edges.

(f) Silver coins. (1) The Secretary shall sell the coins minted under subsection (e) to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses).

(2) Bulk Sales. The Secretary shall make bulk sales of the coins minted under subsection (e) at a reasonable discount.

(3) Numismatic items. For purposes of section 5132(a)(1) of this title, all coins minted under subsection (e) shall be considered to be numismatic items.

(g) For purposes of section 5132(a)(1) of this title, all coins minted under subsection (e) of this section shall be considered to be numismatic items.

(h) The coins issued under this title shall be legal tender as provided in section 5103 of title 31, United States Code.

(i)(1) Notwithstanding section 5111(a)(1) of this title, the Secretary shall mint and issue the gold coins described in paragraphs (7), (8), (9), and (10) of subsection (a) of this section, in quantities sufficient to meet public demand, and such gold coins shall—

(A) have a design determined by the Secretary, except that the fifty dollar gold coin shall have—

(i) on the obverse side, a design symbolic of Liberty; and

(ii) on the reverse side, a design representing a family of eagles, with the male carrying an olive branch and flying above a nest containing a female eagle and hatchlings;

(B) have inscriptions of the denomination, the weight of the fine gold content, the year of minting or issuance, and the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum"; and

(C) have reeded edges.

(2)(A) The secretary shall sell the coins minted under this subsection to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses).

(B) The Secretary shall make bulk sales of the coins minted under this subsection at a reasonable discount.

(3) For purposes of section 5132(a)(1) of this title, all coins minted under this subsection shall be considered to be numismatic items.

(4)(A) Notwithstanding any other provision of law and subject to subparagraph (B), the Secretary of the Treasury may change the diameter, weight, or design of any coin minted under this subsection or the fineness of the gold in the alloy of any such coin if the Secretary determines that the specific diameter, weight, design, or fineness of gold which differs from that otherwise required by law is appropriate for such coin.

(B) The Secretary may not mint any coin with respect to which a determination has been made by the Secretary under subparagraph (A) before the end of the 30-day period beginning on the date a

notice of such determination is published in the Federal Register.

(j) General waiver of procurement regulations. (1) In general. Except as provided in paragraph (2), no provision of law governing procurement or public contracts shall be applicable to the procurement of goods or services necessary for minting, marketing, or issuing any coin authorized under paragraph (7), (8), (9), or 10 of subsection (a) or subsection (e), including any proof version of any such coin.

(2) Equal employment opportunity. Paragraph (1) shall not relieve any person entering into a contract with respect to any coin referred to in such paragraph from complying with any law relating to equal employment opportunity.

(As amended July 9, 1985, P. L. 99-61, Title II, § 202, 99 Stat. 115; Dec. 17, 1985, P. L. 99-185, § 2(a), (b), 99 Stat. 1177; Mar. 31, 1988, P. L. 100-274, §§ 4(a), 6, 102 Stat. 50; Oct. 6, 1992, P. L. 102-390, Title II, Subtitle B, §§ 226(a), 227, 228, 106 Stat. 1630.)

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31 U.S.C. §5118(d)(2)

§ 5118. Gold clauses and consent to sue

(a) In this section—

(1) "gold clause" means a provision in or related to an obligation alleging to give the obligee a right to require payment in—

(A) gold;

(B) a particular United States coin or currency; or

(C) United States money measured in gold or a particular United States coin or currency.

(2) "public debt obligation" means a domestic obligation issued or guaranteed by the United States Government to repay money or interest.

(b) The United States Government may not pay out or deliver any gold coin. A person lawfully holding United States coins and currency may present the coins and currency to the Secretary of the Treasury for exchange (dollar for dollar) for other United States coins and currency that may be lawfully held. The Secretary shall make the exchange under regulations prescribed by the Secretary.

(c)(1) The Government withdraws its consent given to anyone to assert against the Government, its agencies, or its officers, employees, or agents, a claim—

(A) on a gold clause public debt obligation or interest on the obligation;

(B) for United States coins or currency; or

(C) arising out of the surrender, requisition, seizure, or acquisition of United States coins or currency, gold, or silver involving the effect or validity of a change in the metallic content of the dollar or in a regulation about the value of money.

(2) Paragraph (1) of this subsection does not apply to a proceeding in which no claim is made for payment or credit in an amount greater than the face or nominal value in dollars of public debt obligations or United States coins or currency involved in the proceeding.

(3) Except when consent is not withdrawn under this subsection, an amount appropriated for payment on public debt obligations and for United States coins and currency may be expended only dollar for dollar.

(d)(1) In this subsection, "obligation" means any obligation (except United States currency) payable in United States money.

(2) An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This para-

graph does not apply to an obligation issued after October 27, 1977.

(Sept. 13, 1982, P. L. 97-258, § 1, 96 Stat. 985.)

APPENDIX F

EXAMPLES OF CORPORATE TRANSACTIONS ADMITTED BY BURLINGTON NORTHERN

- In May 1981, Burlington Northern underwent a "reverse triangular merger" and a name change. Burlington Northern Inc. ("BNI") formed a wholly owned subsidiary named Burlington Northern Holding Company ("Holding Company"), which in turn formed a wholly owned subsidiary named Burlington Northern Transportation Company ("BNTC"). BNTC was merged into BNI. BNI stock was exchanged for stock in Holding Company, and stock in BNTC was canceled. BNI's name then was changed to Burlington Northern Railroad Company, and the name of Holding Company was changed to Burlington Northern Inc.
- In December 1981, the Colorado and Southern Railway Company was merged into Burlington Northern.
- In December 1982, the Fort Worth and Denver Railway Company was merged into Burlington Northern.
- In January 1986, the Galveston Terminal Railway Company was merged into Burlington Northern.
- In November 1987, the Lake Superior Terminal and Transfer Railway Company ("LST&T") dissolved, and Burlington Northern, which had owned a majority of LST&T's stock, was granted an undivided 4/6 interest in the properties owned by LST&T.

APPENDIX G

EXAMPLES OF ADDITIONAL CORPORATE TRANSACTIONS SUBMITTED BY THE BONDHOLDERS[1]

- In or about November 1977 (with regulatory approval in 1980), the St. Louis-San Francisco Railway Company was merged into Burlington Northern. *See Burlington N. Inc. - Control & Merger — St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 784 (1980).
- In 1983, Burlington Northern acquired El Paso Natural Gas Company.
- In 1985, Burlington Northern purchased Southland Royal Company.
- In 1985, Burlington Northern offered to purchase Northern Pacific Gold Bonds for cash.[2]
- In 1988, Burlington Northern transferred billions of dollars of assets, which had been security for the Gold Bonds, to a subsidiary named Burlington Resources Inc. and subsequently spun it off to Burlington Northern's shareholders.[3]

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[1] *See* Lynn M. Voskuil, *Burlington Northern Inc., in* 5 *International Directory of Company Histories* 425 (Adele Hast, ed., 1992). The Bondholders submitted the related materials to demonstrate to the Court that discovery is necessary to resolve the complex issues in this lawsuit. By submitting these materials, the Bondholders did not intend to lend any credence to Burlington Northern's suggestion that this matter is ripe for summary disposition.

[2] *See* Burlington Northern Cash Purchase Offer, dated April 23, 1985.

[3] *See* Burlington Resources Inc. stock offering prospectus, dated July 7, 1988. The Resource Properties were given to the

[footnote continued]

- In 1990, Burlington Northern offered to exchange new bonds for the Gold Bonds.[4]

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railroads by the United States. These "Land Grants" are discussed in Peter Lynch, *One Up on Wall Street* (Simon & Schuster 1989):

> Many of the publicly traded railroads such as Burlington . . . are land rich, dating back to the nineteenth century when the government gave away half the country as a sop to the railroad tycoons. These companies have the oil and gas rights, the mineral rights, and the timber rights as well.

Id. at 116-17.

> Not only do[es] Burlington Northern . . . own vast amounts of land, as I mentioned before, but it's all carried on the books at a cost of next to nothing.

Id. at 210.

[4]*See* Burlington Northern Prospectus and Consent Solicitation, dated November 8, 1990. Although Burlington Northern was purchasing Gold Bonds for cash and exchanging new bonds for Gold Bonds, the 1985 cash purchase offer and the prospectus for the 1990 exchange offering contain no mention of gold clauses.

APPENDIX H

GENERAL LIEN MORTGAGE.

Northern Pacific Railway Company

TO

The Farmers' Loan and Trust Company,

Trustee.

Dated November 10, 1896

* * *

ARTICLE TWELVE.

SEC. 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the Railway Company, shall bind its successors and assigns, whether so expressed or not.

SEC. 2. Nothing contained in this indenture, or in any bond hereby secured, shall prevent any lawful consolidation or merger of the Railway Company with any other corporation, or any conveyance and transfer, subject to the continuing lien of this indenture and to all the provisions thereof, of all the mortgaged and pledged premises as an entirety to a railroad corporation at that time existing under and by virtue of the laws of the United States or of any State thereof, and lawfully entitled to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the Trustee, or of the bondholders hereunder, and that, upon any such consolidation, merger or sale, the due and

punctual payment of the principal and interest of all of said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger or purchasing as aforesaid.

SEC. 3. In case the Railway Company, pursuant to Section 2 of this Article, shall be consolidated or merged with any other corporation, or shall sell, convey and transfer, subject to this indenture, all the mortgaged and pledged premises as an entirety as aforesaid, the successor corporation formed by such consolidation or into which the Railway Company shall have been merged, or which shall have purchased and received a conveyance and transfer as aforesaid, upon executing and causing to be recorded an indenture with the Trustee, satisfactory to the Trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of said bonds and the performance of all the covenants and conditions of this indenture, shall succeed to, and be substituted for, the Railway Company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part, and such successor corporation thereupon may cause to be signed and may issue, either in its own name or in the name of the Northern Pacific Railway Company, any or all of such bonds which shall not theretofore have been signed by the Northern Pacific Railway Company and delivered to the Trustee, * * *

GENERAL GOLD BOND MORTGAGE

GREAT NORTHERN RAILWAY COMPANY

TO

THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK,

TRUSTEE

INDENTURE

DATED JANUARY 1, 1921

* * *

SEC. 2. Nothing contained in this indenture, or in any General Mortgage bond, shall prevent any consolidation or merger of the Railway Company with any other corporation, or any sale, subject ot the continuing lien of this indenture and to all the provisions thereof, of all the property subject to this indenture, as an entirety, to a railway corporation at that time existing under and by virtue of the laws of any state or states, or of the United States, and empowered to acquire the same; *provided, however,* that such consolidation, merger or sale shall be upon such terms as to preserve and not to impair the lien and security of this indenture, or any of the rights or powers of the Trustee or of the holders of the General Mortgage bonds.

In case the Railway Company shall be consolidated or merged with any other corporation, or shall sell all the property subject to this indenture as an entirety, as aforesaid, the corporation formed by such consolidation, or the corporation into which the Railway Company shall have been merged, or the corporation which shall have purchased as aforesaid, shall execute and cause to be recorded an instrument satisfactory to the Trustee, and to which the Trustee shall be a party, whereby such successor or purchasing corporation shall assume the due and punctual payment of the principal and interest of the General Mortgage bonds and the performance of all the covenants and conditions of this indenture, or any supplement hereto, and thereupon shall succeed to, and be substituted for, the Railway Company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part; and such successor or purchasing corporation thereupon may cause to be signed, and may issue either in its own name or in the name of the Railway Company any or all such bonds which theretofore shall not have been signed by the Railway Company and delivered to the Trustee; * * *

APPENDIX I

BURLINGTON NORTHERN RAILROAD COMPANY
TO
BANKERS TRUST COMPANY,

Trustee.

SUPPLEMENTAL INDENTURE
Dated as of May 14, 1981

TO

NORTHERN PACIFIC RAILWAY COMPANY
PRIOR LIEN MORTGAGE
Dated November 10, 1896

Providing for the Continuation of Obligations
by Reason of the Change of Name of Burlington
Northern Inc. to Burlington Northern Railroad Company

* * *

WITNESSETH:

WHEREAS, Nortnern Pacific Railway Company, mortgagor, on the tenth day of November, 1896, did make, execute and deliver to The Mercantile Trust Company, Trustee, its Prior Lien Mortgage to secure the payment of the principal of and interest on its Prior Lien Railway and Land Grant Gold Bonds, due January 1, 1997 (hereinafter called the "Bonds"); and

WHEREAS, By Supplemental Indenture dated March 2, 1970, Burlington Northern Inc., as successor in interest and title by merger to Northern Pacific Railway Company, assumed and agreed to pay, perform and observe all of the mortgagors covenants and conditions contained in the Prior Lien Mortgage; and

WHEREAS, By Agreement of Merger and Plan of Reorganization dated April 2, 1981 ("Agreement"), made by and among Burlington Northern Inc., Burlington Northern Transportation Company, and Burlington Northern Holding Company, on the effective date of the transactions described in the Agreement, viz: May 14, 1981, inter alia, the corporate name of Burlington Northern Inc. is changed to Burlington Northern Railroad Company; a conformed true copy of the Agreement is attached hereto as Appendix A, incorporated herein and made a part hereof, specific reference to which is hereby made; and

WHEREAS, All of the requisite action described in the Agreement has been taken, and the said change of corporate name so provided for is being accomplished contemporaneously with the execution of this Supplemental Indenture, and all acts, things and deeds necessary to authorize the unbroken continuity of the mortgagor's obligations under the Prior Lien Mortgage by Burlington Northern Railroad Company, and to make this Supplemental Indenture, when executed by the parties hereto, a valid and binding amendent to the Prior Lien Mortgage, have been done, performed and completed.

NOW, THEREFORE, in consideration of the premises and of the sum of Ten Dollars ($10.00) paid by the Trustee to Burlington Northern Railroad Company, receipt of which is hereby acknowledged, to record the change in corporate name, to further secure, and evidence the

continuing undertaking and obligation of payment, performance and observance of all of the covenants and conditions contained in the Prior Lien Mortgage, the parties hereto do hereby covenant and agree as follows:

SECTION 1. Burlington Northern Railroad Company is hereby acknowledged as the Successor Mortgagor under the Prior Lien Mortgage, and as such Successor Mortgagor, Burlington Northern Railroad Company in all respects ratifies, confirms and continues uninterrupted the assumption of obligations under the Prior Lien Mortgage made by Burlington Northern Inc. in the March 2, 1970 Supplemental Indenture. Further Burlington Northern Railroad Company hereby assumes the due and punctual payment of the principal of and interest on all the Bonds, according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of the Prior Lien Mortgage, so that in accordance with the provisions of ARTICLE TWELVE of the Prior Lien Mortgage, Burlington Northern Railroad Company shall succeed to and be substituted for Burlington Northern Inc., with the same effect as if Burlington Northern Railroad Company had been named in the Prior Lien Mortgage as the party of the first part thereto, and had duly executed and delivered the same.

* * *

Supreme Court, U.S.
FILED
AUG 9 1996
CLERK

No. 96-51 (3)

IN THE
Supreme Court Of The United States
October Term, 1995

GUY AND BONNIE L. ADAMS, *et. al.*,
ON THEIR OWN BEHALF AND AS CLASS REPRESENTATIVES OF
ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
AND BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Company and Burlington
Northern Inc.

August 9, 1996

* *Counsel of Record*

39 pp

Question Presented

In 1933, Congress rendered contractual obligations that require payment in gold coins unenforceable, *see* H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463), but subsequently removed that prohibition for obligations issued after October 27, 1977, *see* Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463). The question presented is: Whether the court of appeals correctly held that gold clauses in bonds issued almost a century ago are unenforceable under the 1933 statute as amended in 1977.

Statement Pursuant to Rule 29.6

Respondent Burlington Northern Inc. ("BNI") is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation, which is a publicly held company having no parent company. Respondent Burlington Northern Railroad Company (the "Railroad") is BNI's wholly owned subsidiary. BNI has no nonwholly owned subsidiaries. The following are nonwholly owned subsidiaries of the Railroad: The Belt Railway Company of Chicago; Camas Prairie Railroad Company; Houston Belt & Terminal Railway Company; Iowa Transfer Railway Company; Kansas City Terminal Railway Company; Longview Switching Company; M T Properties, Inc.; Paducah & Illinois Railroad Company; Portland Terminal Railroad Company; Terminal Railroad Association of St. Louis; TTX Company; and The Wichita Union Terminal Railway Company.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutes or Other Provisions Involved	1
Statement of the Case	1
A. Introduction.	1
B. The Bonds At Issue.	2
C. The Statutory Background.	3
D. Proceedings Before The District Court.	6
E. Proceedings Before The Court Of Appeals.	8
Reasons for Denying the Writ	10
I. THE STATUTORY PROVISIONS AT ISSUE ARE CLEAR ON THEIR FACE.	11
II. THERE IS NO SPLIT AMONG THE COURTS CONCERNING THE APPLICATION OF THE STATUTORY PROVISIONS AT ISSUE.	12
III. THIS CASE DOES NOT PRESENT AN UNRESOLVED CONSTITUTIONAL ISSUE.	12
IV. THE BONDHOLDERS' STATUTORY AND CONSTITUTIONAL ARGUMENTS ARE WITHOUT MERIT.	13

Page

A. The Bondholders' "Abated Impediment" Argument Conflicts With The Plain Language Of The Statute. 13

B. The Bondholders' Constitutional Theories Are Baseless. 16

C. The 1977 Amendment Does Not Apply Because The Bonds Were "Issued" Before The Amendment Was Enacted. 17

V. THE FACTS OF THIS CASE DO NOT MAKE THE GOLD CLAUSES ENFORCEABLE. 19

A. Post-1977 Events Did Not Effect A Novation Of The Gold Bonds. 19

1. The 1981 Name Change Did Not Effect A Novation. 20

2. The Other "Mergers and Consolidations" And The *Rievman* Settlement Did Not Effect A Novation. 22

3. The New Transactions Identified By The Bondholders Are Not Part Of The Record And Did Not Effect A Novation. 24

B. Burlington Was Entitled To Summary Judgment. 25

Conclusion 27

TABLE OF AUTHORITIES

Cases	Page(s)
Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977), *cert denied sub nom. Harry Goodkin & Co. v. Abrahamson*, 436 U.S. 905, *and cert. denied*, 436 U.S. 913 (1978)	18, 19
Adams v. CSX Transp., Inc., No. 94-35618 (9th Cir. filed June 22, 1994)	2
American Express Travel Related Servs. Co. v. Berlye, 414 S.E.2d 499 (Ga. Ct. App. 1991)	21
Averhoff v. People Fin. Co. (In re Averhoff), 18 B.R. 198 (Bankr. N.D. Iowa 1982)	23
Beck v. Mfrs. Hanover Trust Co., 481 N.Y.S.2d 211 (N.Y. Sup. Ct. 1984)	20
Berkeley v. Home Ins. Co., 68 F.3d 1409 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1825 (1996)	25
Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)	16
Cyrix Corp. v. Intel Corp., 803 F. Supp. 1200 (E.D. Tex. 1992), *appeal dismissed*, 9 F.3d 978 (Fed. Cir. 1993)	21
Davis V. Gutheil, 152 P. 14 (Wash. 1915)	22
Dowling v. City of Philadelphia, 855 F.2d 136 (3d Cir. 1988)	25
Emmons v. McLaughlin, 874 F.2d 351 (6th Cir. 1989)	25

Page(s)

Equitable Life Assurance Soc'y of N.Y. v. Grosvenor, 426 F. Supp. 67 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1279 (6th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) 13

Fay Corp. v. BAT Holdings I, Inc., 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990) 9, 18

Feldman v. Great N. Ry., 428 F. Supp. 979 (S.D.N.Y. 1977) . . . . . *passim*

Ford Motor Credit Co. v. Beneficial Commercial Corp. (In re McClure), 108 B.R. 468 (Bankr. M.D. Pa. 1989) 23

Gary-Wheaton Bank v. Burt, 433 N.E.2d 315 (Ill. App. Ct. 1982) 22

Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry., 649 P.2d 947 (Ala. 1982) . . . . . *passim*

Guaranty Trust Co. of N.Y. v. Henwood, 307 U.S. 247 (1939) 13, 14

Harris v. Duty Free Shoppers Ltd. Partnership, 940 F.2d 1272 (9th Cir. 1991) 25

Healey v. Healey, 594 N.Y.S.2d 90 (N.Y. App. Div. 1993) 20

Holyoke Water Power Co. v. American Writing Paper Co., 300 U.S. 324 (1937) . . . 3, 13

Page(s)

In re Dukes, No. 87-830-W, 1988 WL 58009 (Bankr. S.D. Iowa Feb. 29, 1988) . . . 23

In re Tardy, 18 B.R. 36 (Bankr. C.D. Ill. 1982) 23

John Wanamaker New York, Inc. v. Comfort, 53 F.2d 751 (5th Cir.), *cert. denied*, 285 U.S. 560 (1931) 21

Krim v. BancTexas Group, Inc., 989 F.2d 1435 (5th Cir. 1993) 25

Liberty Sav. & Loan Ass'n v. Greenberg (In re Greenberg), 81 B.R. 662 (Bankr. M.D. Fla. 1987) 23

MacPherson v. Franco, 208 P.2d 641 (Wash. 1949) 20

Melat v. Melat, 602 A.2d 380 (Pa. Super. Ct. 1992) 24

Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27 (1st Cir. 1995) 25

Mountainview Realty Assocs. v. Stark, 593 N.Y.S.2d 800 (N.Y. App. Div. 1993) 24

Norman v. Baltimore & O.R., 294 U.S. 240 (1935) 13, 16

Pasternak v. Lear Petroleum Explorations, Inc., 790 F.2d 828 (10th Cir. 1986) 25

Pioneer Credit Corp. v. Carden, 245 A.2d 891 (Vt. 1968) 24

Polk Chevrolet, Inc. v. Vicaro, 162 So.2d 761 (La. Ct. App. 1964) 24

Page(s)

Rudolph v. Steinhardt, 721 F.2d 1324 (11th Cir. 1983) 3

Sage Realty Corp. v. Insurance Co. of N. Am., 34 F.3d 124 (2d Cir. 1994) 25

Schickler v. Santa Fe S. Pac. Corp., 593 N.E.2d 961 (Ill. App. Ct. 1992) . . . . . *passim*

Security Benefit Life Ins. Co. v. FDIC, 804 F. Supp. 217 (D. Kan. 1992) 20, 21

Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039 (2d Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983) 20

Southern Capital Corp. v. Southern Pac. Co., 568 F.2d 590 (8th Cir.), *cert. denied*, 436 U.S. 927 (1978) 13

Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) 25

Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 736 F. Supp. 1281 (S.D.N.Y. 1990), *aff'd*, 925 F.2d 566 (2d Cir. 1991) 20

Trebilcock v. Wilson, 79 U.S. (12 Wall.) 687 (1871) 15

Walker v. KFC Corp., 728 F.2d 1215 (9th Cir. 1984) 20, 24

Wells Fargo Bank v. Bank of Am., 38 Cal. Rptr. 2d 521 (Cal. Ct. App. 1995) 18

	Page(s)
Wilson v. Midstate Indus., Inc., 777 S.W.2d 310 (Mo. Ct. App. 1989)	22
Constitutional Provisions	
U.S. Const. art. I, § 8, cl. 3	1, 16
U.S. Const. art. I, § 8, cl. 5	1
Statutes, Regulations, and Rules	
28 U.S.C. § 1254 (1994)	1
31 U.S.C. § 5112(h) (1994)	6, 13
31 U.S.C. § 5112(i) (1994)	6, 13
31 U.S.C. § 5118(a)(1) (1994)	6
31 U.S.C. § 5118(d)(2) (1994)	*passim*
Act of Feb. 25, 1862, ch. 41, § 1, 12 Stat. 345	15
Commodity Exchange Act, 7 U.S.C. §§ 1-26 (1994)	16
Gold Standard Act of 1900, ch. 41, § 2, 31 Stat. 45	3
Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (1994)	19
H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112 (1933)	*passim*
Pub. L. No. 93-110, 87 Stat. 352 (1973)	5
Pub. L. No. 93-373, 88 Stat. 445 (1974)	5
Pub. L. No. 95-147, 91 Stat. 1227 (1977)	*passim*

Page(s)

48 C.F.R. §§ 42.1200-42.1205 (1993) 21

Fed. R. Civ. P. 56(f) 7, 8, 25, 26

Sup. Ct. R. 10 10

Legislative History

123 Cong. Rec. 633 (1977) (statement of Sen. Helms) 5

131 Cong. Rec. H4,785 (daily ed. June 24, 1985) (remarks of Rep. Annunzio) 6

131 Cong. Rec. H7,087, H7,089 (daily ed. Aug. 1, 1985) (remarks of Rep. Annunzio) 6

131 Cong. Rec. H10, 528, H10, 532 (daily ed. Dec. 2, 1985) (remarks of Rep. Bartlett) 6

131 Cong. Rec. S15,664, S15,665 (daily ed. Nov. 14, 1985) (remarks of Sen. Cranston) 6

H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895 6

S. Rep. No. 99, 73d Cong., 1st Sess. (1933). . . 3

Other Authorities

11 Am. Jur. 2d *Bills and Notes* (1963) 22

58 Am. Jur. 2d *Novation* (1989) 20, 23

66 C.J.S. *Novation* (1950) 22, 24

	Page(s)
Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504 (1983)	3
6A Fletcher Cyc. Corp. (1989)	18
The Gold Bonanza That's Up to the Courts, Bus. Wk., Jan. 12, 1976, at 66	17
22 N.Y. Jur. 2d *Contracts* (1982)	20, 21
Restatement (Second) of Contracts (1979) . . .	21

Opinions Below

The opinion of the court of appeals (Pet. App. 1a) is reported at 80 F.3d 1377. The decision of the district court was rendered orally from the bench on April 11, 1994. The judgment of the district court (Pet. App. 17a) was entered on the same day.

Jurisdiction

The judgment of the court of appeals was entered on April 10, 1996. The petition for a writ of *certiorari* was filed on July 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1994).

Statutes or Other Provisions Involved

The statutory provisions at issue are: H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463), reprinted at Pet. App. 51a; Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463), reprinted at Pet. App. 62a; and 31 U.S.C. § 5118(d)(2) (1994), reprinted at Pet. App. 71a.

The constitutional provisions at issue are: U.S. Const. art. I, § 8, cl. 3; and U.S. Const. art I, § 8, cl. 5.

Statement of the Case

A. Introduction.

This is an action to enforce gold clauses in bonds issued nearly a century ago by the Northern Pacific Railway Company ("Northern Pacific") and the Great Northern Railway Company ("Great Northern") pursuant to 1896 and 1921 indentures. Approximately 125 bondholders ("Petitioners" or "Bondholders") filed this action on November 15, 1993, against Burlington Northern Railroad Company (the "Railroad")—which inherited obligor status on the bonds when Northern Pacific and Great Northern merged

into it in 1970—and its corporate parent, Burlington Northern Inc. (collectively, "Burlington").

Although Congress rendered gold clauses in obligations issued before 1977 unenforceable, 31 U.S.C. § 5118(d)(2) (1994), Petitioners claim they are contractually entitled to payment of principal and interest in gold. On April 11, 1994, the United States District Court for the Western District of Washington granted Burlington's motion to dismiss or, in the alternative, for summary judgment. On April 10, 1996, the United States Court of Appeals for the Ninth Circuit unanimously affirmed the ruling of the district court.[1]

B. The Bonds At Issue.

Four bond issues are the subject of this action: the 1945 and 1946 Great Northern issues and two 1896 Northern Pacific issues (the "Bonds"). Each of the issues and their respective indentures contains a "gold clause". For example, the Northern Pacific bonds call for payment of "[a certain amount of] Dollars, gold coin of the United States of America of the present [*i.e.*, 1896 or 1921] standard of weight and fineness". Pet. App. 4a. Approximately $92 million of the Northern Pacific bonds and approximately $62 million of the Great Northern bonds were outstanding at the time of the district court proceeding. *Id.* 4a.-5a. Each bond issue trades on the New York Stock Exchange at prices reflecting the market's belief that the bonds will be paid in current legal tender, not gold coin or its equivalent. *Id.* 5a. If the method of payment were to return to gold coin, the value of the bonds would skyrocket to approximately $2.7 billion in principal alone, which is an increase of 2,000 percent. *Id.*

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[1] The Ninth Circuit consolidated the Bondholders' appeal with a similar appeal, *Adams v. CSX Transp., Inc.*, No. 94-35618 (9th Cir. filed June 22, 1994). The opinion rendered covered both cases. The appellants in *Adams v. CSX Transp., Inc.* filed a petition for rehearing en banc, which was denied by the Ninth Circuit on June 24, 1996.

C. The Statutory Background.

Before President Franklin Roosevelt took office, the law required the United States Treasury to deliver a certain statutorily fixed amount of gold to anyone tendering Federal Reserve notes (the paper money of the United States) for that purpose.[2] Gold coin that was legal tender and contained the statutorily fixed amount of gold was in circulation. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325 (11th Cir. 1983). Likewise, debt instruments often contained "gold clauses". Some such clauses gave the obligee the option between legal-tender currency or a certain contractually fixed amount of bullion. *See, e.g., Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324, 333 (1937). Others, like the ones here at issue, called for payment of a certain amount of "gold coin".

All of this changed when, to address the economic turmoil occasioned by the Great Depression, a series of measures in 1933 and 1934 drastically reduced the role of gold in the monetary system of the United States.[3] One of these measures rendered gold clauses unenforceable. In 1933, Congress determined that such clauses "interfere[d] with the power of Congress to regulate the value of the money of the United States" and its "authority to control [the United States'] gold resources". S. Rep. No. 99, 73d Cong., 1st

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[2] *See* Gold Standard Act of 1900, ch. 41, § 2, 31 Stat. 45 (formerly codified at 31 U.S.C. § 468). Until 1934, one dollar was worth 25.8 grains of 9/10 fine gold. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325, 1326 & n.7 (11th Cir. 1983). In other words, the price of one troy ounce of pure gold was $20.67. *Id.* at 1325.

[3] These included measures suspending payments in gold coin, bullion, or gold certificate; making it unlawful to own gold in the United States; and requiring all gold coin to be surrendered to the Treasury so that it could be melted down into bullion. *See generally* Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504, 509-10, 514 (1983).

Sess. 1 (1933). Congress therefore adopted a Joint Resolution declaring gold clauses to be unenforceable, § 1 of which provided:

> "[E]very provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

H.R.J. Res. 192, 73d Cong., 1st Sess., 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463).[4]

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[4] The Resolution's preamble stated:

> "Whereas the holding of or dealing in gold affect[s] the public interest, and [is] therefore subject to proper regulation and restriction; and
>
> "Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

48 Stat. 112 (1933).

The 1970s brought a more permissive attitude towards the role of gold in the economy.[5] As part of this trend, Congress enacted a statute in October 1977 providing:

> "The joint resolution entitled 'Joint Resolution to assure uniform value to the coins and currencies of the United States', approved June 5, 1933 (31 U.S.C. 463), shall not apply to obligations issued on or after the date of enactment of this section."

Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. § 463). Thus, in 1977, it once again became possible to issue obligations containing enforceable gold clauses. But the 1977 amendment did not affect obligations issued prior to its enactment. Pre-1977 gold clauses remained unenforceable by virtue of the 1933 statute. As explained by Senator Helms, a sponsor of the 1977 amendment, that amendment "make[s] enforceable[] gold clause contracts entered into *after* [its] enactment . . . . *It is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past.*" 123 Cong. Rec. 633, 635 (1977) (emphasis added).

In a 1982 recodification of Title 31 of the United States Code, Congress slightly reworded the 1933 statute and its 1977 amendment:

> "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph

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[5] The more permissive trend was ushered in by a 1974 measure making private ownership of gold lawful once again. *See* Pub. L. No. 93-373, 88 Stat. 445 (1974) (formerly codified at 31 U.S.C. § 442). A previous measure, Pub. L. No. 93-110, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 442), authorized the President to make it lawful to own gold, but that authorization expired unused.

> does not apply to an obligation issued after October 27, 1977."

31 U.S.C. § 5118(d)(2) (1994).[6] The legislative history makes clear that no substantive changes were intended. *See* H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982) ("The purpose of the bill is to restate in comprehensive form, without substantive change, certain laws . . . related to money and finance."), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1895-98.[7]

D. Proceedings Before The District Court.

On January 31, 1994, Burlington moved to dismiss or, in the alternative, for summary judgment on the ground that the 1933 statute (as recodified in 1982) rendered the Bonds' gold clauses unenforceable. The Bondholders responded that the 1933 statute did not apply for three primary reasons. *First*, the Bondholders claimed that the 1985 statute authorizing the minting of American Eagle gold coins lifted a "temporary impediment" to payment in gold, and that the Railroad

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[6] The recodified statute also defines "gold clause" as "a provision in or related to an obligation alleging to give the obligee a right to require payment in . . . gold; . . . a particular United States coin or currency; or . . . United States money measured in gold or a particular United States coin or currency." 31 U.S.C. § 5118(a)(1) (1994).

[7] Congress's more permissive attitude towards gold as a monetary instrument continued in 1985, when it authorized the minting of gold coins called American Eagles. 31 U.S.C. § 5112(h), (i) (1994). The legislative history shows that Congress thereby intended to provide an alternative to the Krugerrand, a South African gold coin seen as a symbol of apartheid. *See, e.g.*, 131 Cong. Rec. H10,528, H10,532 (daily ed. Dec. 2, 1985) (remarks of Rep. Bartlett); 131 Cong. Rec. S15,664, S15,665 (daily ed. Nov. 14, 1985) (remarks of Sen. Cranston). The legislative history further shows that Congress endowed the coins with a legal-tender face value to enhance their appeal to investors and collectors. *See, e.g.*, 131 Cong. Rec. H7,087, H7,089 (daily ed. Aug. 1, 1985) (remarks of Rep. Annunzio); 131 Cong. Rec. H4,785 (daily ed. June 24, 1985) (remarks of Rep. Annunzio).

therefore could no longer rely upon the 1933 statute in its defense. *Second*, the Bondholders claimed that the 1933 statute offended the constitution. *Third*, the Bondholders claimed that, for purposes of the 1977 amendment, various post-1977 corporate "mergers and consolidations" and the settlement of a lawsuit involving the Railroad had caused new "obligations" to be "issued", thus "reviving" the gold clauses. The Bondholders also argued that Burlington's motion should be treated as one for summary judgment because Burlington had relied on materials outside the Complaint,[8] and that, pursuant to Federal Rule of Civil Procedure 56(f), the motion should be continued so that the Bondholders could take additional discovery.[9]

Ruling from the bench, Judge Dwyer granted Burlington's motion. The district court ruled (1) that "the 1933 statute . . . survives as to all obligations issued before October 27, 1977", and that "[t]hat result is not changed by the 1977 statute nor by the 1985 enactment nor by anything else that has happened", Tr. of Proceedings Before Judge Dwyer at 23 (Apr. 11, 1994); (2) that courts before it had rejected the Bondholders' constitutional claims, and that there was "no basis on which this court could or should depart from those

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[8] Burlington relied on the Affidavit of Edmund W. Burke (Jan. 31, 1994) ("Burke Affidavit") in support of its motion. That Affidavit attached (1) each post-1977 agreement with the Bondholders as a class that was referred to in ¶ 22(a) of the Complaint, Pet. App. 29a; and (2) the settlement agreement in *Rievman v. Burlington Northern R.R.* (the "*Rievman* settlement") that was referred to in ¶ 22(b) of the Complaint, *id.*

[9] The Bondholders filed a Rule 56(f) affidavit stating that they intend to seek (1) "information . . . about defendants' complex corporate activities" and (2) "information about the benefits defendants have received from their continued reliance upon the 1933 Resolution and defendants' continuing attempts to avoid their obligations under the Gold Bonds". *See* Declaration of Camden M. Hall (Mar. 1, 1994) ¶ 4 ("Hall Decl.").

earlier holdings", *id.* at 24; (3) that the post-1977 transactions referred to in the Complaint did not cause an "obligation" to "issue" within the meaning of the 1977 amendment, *id.*; (4) that in ruling on a motion to dismiss, it was proper for it to consider the agreements attached to the Burke Affidavit that were referred to in the Complaint, *id.* at 22, 24; and (5) that, even if treated as one for summary judgment, there was no reason to continue Burlington's motion pursuant to Rule 56(f) because "[t]here ha[d] not been a sufficient showing of information of any kind which could be added to the present record which would make a difference", *id.* at 26.

E. Proceedings Before The Court Of Appeals.

The Bondholders appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. In an opinion written by Judge Canby, the court of appeals unanimously affirmed the district court. The court of appeals properly identified the statutory framework at issue:

> "In 1933, Congress passed a Joint Resolution . . . providing that any obligation containing a gold clause 'shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.' The statute gave the obligor the option of paying its debts in any form of legal tender, including gold, and prevented any obligee from enforcing gold clauses in existing or future obligations. . . . In 1977, Congress amended the 1933 Statute by providing that it did 'not apply to obligations issued on or after the date of enactment of this section'". Pet. App. 6a-7a (citations omitted).

The court of appeals also properly identified the "issues presented here [as] whether the 1977 legislation revived . . . ancient gold clauses, and whether various actions of the parties have created new, post-1977 obligations payable in

gold". *Id.* 4a. The court held that the "answer to both questions is 'no'". *Id.*

The court of appeals held that "the 1933 statute and its 1977 amendment are clear on their face". *Id.* 9a. Those statutes provide that "[o]bligations payable in gold are discharged by payment in any United States legal tender, but that command does not apply to obligations issued after October 27, 1977". *Id.* The court of appeals rejected the Bondholders' "abated impediment" argument—namely, that the 1933 statute merely created an "impediment" to the payment of gold that was subsequently removed by Congress in 1985 when it authorized the minting of American Eagle gold coins—because that argument "conflicts with the plain meaning of the 1933 statute". *Id.* 10a. The 1933 statute "does not simply forbid payment in illegal tender; it affirmatively authorizes payment in any tender legal at the time of payment". *Id.* Thus, the court concluded that even if gold is legal tender after 1985, the 1933 statute allows the Railroad to discharge its pre-1977 gold obligations either in "gold coins if it wishes to" or "any [other] legal tender". *Id.*

The court of appeals then rejected the Bondholders' argument that the "sale and transfer of the bonds, as well as certain business transactions and reorganizations, such as mergers and a change in the security for the bond debt, effected a new issuance of bonds after 1977". *Id.* The court held that "bonds are 'issued' within the meaning of the 1977 amendment when they are delivered to the first holder". *Id.* 11a. The court thus distinguished an earlier Ninth Circuit case that had held that a novation of a pre-1977 real estate lease could cause an obligation to "issue" after 1977: "Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue". *Id.* 13a (distinguishing *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227

(9th Cir. 1990) (per curiam)). Moreover, the court held that "[e]ven if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation". *Id.* 14a n.4.

The court of appeals also rejected the Bondholders' argument that the 1933 statute is unconstitutional: "This issue has been litigated repeatedly and resolved; Congress's abrogation of the gold clauses was constitutional". *Id.* 15a (collecting cases). Finally, the court of appeals held that the district court properly entered summary judgment for Burlington, because the Bondholders "did not demonstrate that there are any disputed issues of material fact regarding whether the Railroad's bonds were first issued in 1896 and 1921, respectively," or "that additional discovery could lead to evidence raising a triable issue". *Id.*

Reasons for Denying the Writ

The court of appeals correctly held that the 1933 statute and its 1977 amendment (as recodified in 1982) prohibit the enforcement of gold clauses in bonds issued nearly a century ago. Those statutory provisions are clear on their face. They expressly provide that the Railroad may discharge its gold bond obligations in any legal tender. There is no split in authority. Every court that has interpreted those provisions has reached the same conclusion as the court of appeals. Moreover, this Court and other courts have upheld the provisions against virtually every imaginable constitutional challenge. Further review is simply unnecessary.

The Bondholders do not argue that this case is worthy of *certiorari* under the criteria set forth in Supreme Court Rule 10. *See* Sup. Ct. R. 10 ("compelling reasons" for granting *certiorari* include conflict among the courts and importance of unresolved Federal question). Rather, they argue that the court of appeals erred when it rejected each of

their "novel" statutory and constitutional arguments. Pet. 8-13. The court of appeals, however, properly held that each such argument was without merit. The Bondholders' arguments are contrary to the plain language of the statutory provisions at issue and this Court's longstanding precedents. There is no reason to disregard that plain language or to reevaluate those precedents.

Even if the Bondholders' tortured construction of the statutes at issue had some merit, this Court should nonetheless deny *certiorari*. The Bondholders argue, at bottom, that the 1977 amendment applies to the particular facts of this case, thus entitling them either to enforce the ancient gold clause obligations or, at a minimum, to conduct additional discovery. Pet. 13-20. But *certiorari* is reserved for cases of consequence to other litigants in other situations. A case is simply not worthy of *certiorari* because of its "unique facts". Even if it were, the court of appeals correctly held that there is nothing about the facts alleged by the Bondholders that renders the gold clauses enforceable.

I. THE STATUTORY PROVISIONS AT ISSUE ARE CLEAR ON THEIR FACE.

The statutory provisions at issue are unambiguous and therefore do not merit this Court's review. The court of appeals correctly held that the 1933 statute and its 1977 amendment (as recodified in 1982) are "clear on their face". Pet. App. 9a. The 1933 statute expressly states that obligations payable in gold "*shall be discharged* upon payment . . . in *any* coin or currency which at the time of payment is legal tender". 48 Stat. 112, 113 (1933) (emphasis added). The 1977 amendment removed that command for "obligation[s] issued on or after the date of [its] enactment". 91 Stat. 1227, 1229 (1977). The 1982 recodification, which was not intended to effect any substantive changes, is equally clear that obligations containing a gold clause issued prior to the 1977 amendment shall be "discharged on payment . . . in

United States coin or currency that is legal tender at the time of payment". 31 U.S.C. § 5118(d)(2) (1994). There is no dispute that the Bonds were "issued before 1933". Pet. 2. Thus, the statutory provisions at issue here render the gold clauses unenforceable by expressly granting the Railroad the right to discharge its gold bond obligations in any legal tender.

II. THERE IS NO SPLIT AMONG THE COURTS CONCERNING THE APPLICATION OF THE STATUTORY PROVISIONS AT ISSUE.

The decision of the court of appeals is in line with all other decisions addressing the enforceability of gold clauses within bonds. Upon passage of the 1977 amendment, class action lawyers filed suits on behalf of bondholders across the country seeking to enforce ancient gold clause obligations. Courts have dismissed those suits without exception on the ground that the 1977 amendment does not affect the application of the 1933 statute to preexisting gold bonds. *See, e.g., Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.*, 649 P.2d 947 (Ala. 1982); *Schickler v. Santa Fe S. Pac. Corp.*, 593 N.E.2d 961 (Ill. App. Ct. 1992). Indeed, almost immediately after passage of the 1977 amendment, one of the gold clauses at issue in this very case was held unenforceable under the 1933 statute. *See Feldman v. Great N. Ry. Co.*, 428 F. Supp. 979 (S.D.N.Y. 1977). Because the court of appeals' decision is consistent with all other relevant precedent, there is no need for further review.

III. THIS CASE DOES NOT PRESENT AN UNRESOLVED CONSTITUTIONAL ISSUE.

The 1933 statute has been upheld against virtually every conceivable constitutional challenge. Courts, including this one, have held that in enacting the 1933 statute, Congress acted well within the scope of its constitutional powers, *see*,

e.g., *Norman v. Baltimore & O.R.*, 294 U.S. 240, 302-11 (1935); that the 1933 statute in no way violates the Fifth Amendment, *see, e.g.*, *Guaranty Trust Co. of N.Y. v. Henwood*, 307 U.S. 247, 259 (1939); *Holyoke*, 300 U.S. at 340; *Gold Bondholders*, 649 P.2d at 950; and that the 1933 statute did not become unlawful when the economic emergency of the 1930s abated, *see Southern Capital Corp. v. Southern Pac. Co.*, 568 F.2d 590, 591-92 (8th Cir.), *cert. denied*, 436 U.S. 927 (1978); *Feldman*, 428 F. Supp. at 982; *Equitable Life Assurance Soc'y of N.Y. v. Grosvenor*, 426 F. Supp. 67, 73 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1279 (6th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Schickler*, 593 N.E.2d at 964-65. In light of this line of precedent, the Bondholders cannot plausibly contend that their claim presents an unresolved constitutional issue.

IV. THE BONDHOLDERS' STATUTORY AND CONSTITUTIONAL ARGUMENTS ARE WITHOUT MERIT.

A. The Bondholders' "Abated Impediment" Argument Conflicts With The Plain Language Of The Statute.

The Bondholders argued below, and now argue to this Court, that when Congress authorized the minting of so-called American Eagle gold coins in 1985, 31 U.S.C. § 5112(h), (i) (1994), it removed the "impediment" to the payment of gold created by the 1933 statute, thereby reviving all gold clause obligations. The court of appeals correctly held that the Bondholders' argument "conflicts with the plain meaning of the 1933 statute". Pet. App. 10a. The reason that, after June 5, 1933, the Bondholders as a class were no longer entitled to payment in gold is not that the 1933 statute made the payment of gold coins illegal or impossible. Rather, that statute (in both its original and recodified version) by its own terms rendered gold clauses "unenforceable" by making obligations governed by such a clause "dischargeable in . . . United States

legal tender". *Guaranty Trust Co.*, 307 U.S. at 258.[10] Thus, under the 1933 statute (as recodified), the Railroad has an affirmative, statutory right to discharge its gold bond obligations in *any* legal tender. *See* 31 U.S.C. § 5118(d)(2) (1994) (gold-clause obligation "is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender"); 48 Stat. 112, 113 (1933) (gold-clause obligation "shall be discharged upon payment, dollar for dollar, in any coin or currency which . . . is legal tender").

The Railroad's statutory right to discharge the Bonds in any legal tender was not altered when Congress authorized the minting of American Eagle gold coins. The 1933 statute does not specify that a gold-clause obligor must use a particular kind of legal tender to obtain discharge, and it certainly does not say that gold-clause obligors must use gold coin if lawfully available. The 1933 statute allows gold-clause obligors to obtain discharge with any of the various payment media that have legal-tender status. The only significance here of the 1985 statute was to add American Eagles to the kinds of payment gold-clause obligors can use to discharge their obligations. As the court of appeals held, "[t]he effect of the 1985 statute is to permit the [Railroad] to make payment in gold coins if it wishes to, but its debts are discharged if it pays in any legal tender. Section 5118(d)(2) so states". Pet. App. 10a.[11]

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[10] *See also Feldman*, 428 F. Supp. at 982; *Gold Bondholders*, 649 P.2d at 949; *Schickler*, 593 N.E.2d at 967.

[11] The Bondholders also suggest that the 1985 statute by implication repealed the 1933 statute. Pet. 10-11. However, the Bondholders concede that repeals by implication will not be found unless statutes are "irreconcilable", *id.* at 10-11, and they never explain why the 1985 statute is irreconcilable with the 1933 statute. Gold coins' legal-tender status is in no way inconsistent with gold-clause obligors' statutory right to discharge their obligations in legal tender, be it regular money or gold coin.

The Bondholders rely upon *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687 (1871) (cited in Pet. 9), but that case is inapposite. In *Trebilcock*, this Court interpreted a Civil War statute making United States notes "a legal tender in payment of *all debts*". Act of Feb. 25, 1862, ch. 41, § 1, 12 Stat. 345 (emphasis added). An obligor on a note requiring payment "in specie" argued that, in light of the 1862 statute, he could discharge that note by paying United States notes. This Court disagreed, holding that (1) the note's words "in specie" meant "in gold or silver coin", 79 U.S. at 695, and (2) the statute's words "debts" included obligations "payable in money generally", but not obligations payable in gold coin, *id.* at 697. Unlike the 1933 statute, the statute there in question did not authorize "in specie" obligations to be satisfied by legal-tender other than gold coin. Moreover, the 1862 statute only applied to the discharge of "debts", which was held not to include obligations to pay in gold. Thus, *Trebilcock* is not on point because the 1933 statute (as recodified) expressly applies to obligations to pay in gold ("gold clause[s]") and expressly authorizes their discharge in "any . . . legal tender".[12]

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[12] The Bondholders attempt to obfuscate the clear holdings of *Trebilcock* by suggesting that the 1862 statute provided for discharge of gold-clause obligations upon the payment of legal tender, Pet. 9, and that the Court held for the obligee because, "despite the existence of two forms of legal tender, the parties' agreement expressly provided for the method of payment: gold", *id.* This argument is a transparent attempt at verbal legerdemain. In *Trebilock*, this Court held that obligations to pay in gold were not encompassed within the term "debts" as used in the 1862 statute. It certainly did not hold that where a statute explicitly makes gold-clause obligations dischargeable upon payment of legal tender, payment in gold coin is required nonetheless.

B. The Bondholders' Constitutional Theories Are Baseless.

The Bondholders argue that the 1985 statute authorizing the minting of American Eagle gold coins somehow made the 1933 statute unconstitutional, saying that "[i]f gold is not legal tender, [then] it is a commodity", Pet. 11, and, if that is so, then Congress lacks "authority to regulate [its] use and value", *id.* This assertion is both circular and wrong. The 1933 statute, together with other measures, aimed to curtail gold's monetary role. If that step helped to, as the Bondholders put it, reduce gold to a "commodity", that means that Congress was successful in exercising its authority over the monetary system—not that it lacked authority for its actions. *See Norman*, 294 U.S. at 302-06 (holding Congress acted within its authority over the monetary system when enacting the 1933 statute). At any rate, the Bondholders never explain how it is that Congress stands powerless to regulate the use and value of commodities. The Commerce Clause explicitly authorizes Congress to regulate interstate commerce, U.S. Const. art. I, § 8, cl. 3, and Congress has often regulated the use and value of commodities. *See, e.g.*, Commodity Exchange Act, 7 U.S.C. §§ 1-26 (1994).[13]

The Bondholders also argue that a continued refusal to enforce pre-1977 gold clauses lacks a "rational basis" after gold again became legal tender. The argument fails. When Congress enacted the 1977 amendment, gold-clause

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[13] The Bondholders further assert (again without explanation) that "[t]he enactment of the 1985 Statute also supports a declaration of unconstitutionality of the 1933 Resolution under the 'changed circumstances' doctrine recognized in *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924)". Pet. 11. That argument has no support. This Court and other courts have held that the constitutionality of the 1933 statute does not depend upon a particular set of facts or circumstances existing at the time of its passage. *See Norman*, 294 U.S. at 302-06; *Schickler*, 593 N.E.2d at 964.

obligations of hundreds of millions of dollars in face amount were still outstanding. *See Feldman*, 428 F. Supp. at 986 & n.17. "Reviving" those gold clauses, causing already vast obligations to multiply exponentially in value, would have devastating consequences for gold-clause obligors, perhaps to the point of reducing entire industries (including the railroad industry) to financial disarray. As one court stated:

> "Clearly, the potential economic impact that would result from reviving gold clauses previously abrogated in 1933 would on its face provide a rational basis for application of the [1933 statute] retrospectively to gold clauses in existence prior to 1977."

Schickler, 593 N.E.2d at 966; *cf. Feldman*, 428 F. Supp. at 986 & n.17 (noting that "serious consequences" would have resulted from revival).[14]

C. The 1977 Amendment Does Not Apply Because The Bonds Were "Issued" Before The Amendment Was Enacted.

The Bondholders argue that the gold bonds were "issued" after October 27, 1977, within the meaning of the 1977 amendment. The court of appeals, however, correctly held that, as a matter of law, bonds are "'issued' within the

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[14] Congress surely would be justified in assuming that most of the investors holding gold bonds issued before 1977 purchased them after 1933, and thus never bargained for, relied upon, or gave value for a gold clause. To revive the gold clauses in such bonds therefore would compensate parties that were never injured. It seems not only rational but eminently just that Congress has declined to do so. Those who, after 1933, purchased bonds with gold in mind clearly acted at their own peril. *See, e.g., The Gold Bonanza That's Up to the Courts*, Bus. Wk., Jan. 12, 1976, at 66 (saying possibility that courts might hold 1974 statute repealing prohibition of private gold ownership to have impliedly repealed 1933 statute "offers investors with a fondness for long shots a good speculative play").

meaning of the 1977 amendment when they are delivered to the first holder". Pet. App. 11a. Indeed, the word "issue" has a very definite meaning with respect to bonds. It is well established that a bond is "issued' on the date it is first delivered to someone who claims it as a debt against the corporation. *See id.* (citing 6A Fletcher Cyc. Corp. § 2688 (1989)); *Gold Bondholders*, 649 P.2d at 950-51. Thus, the "Railroad's bonds were 'issued' on the date of first issue . . . . They consequently are subject to the 1933 statute and may be paid with any legal tender". Pet. App. 14a (footnote omitted).

The Bondholders neither address the court of appeals' interpretation of the 1977 amendment nor quote the relevant language of that amendment—"obligation issued"—in their Petition. Instead, they argue that the Railroad created a "new security" through a "substituted contract or novation" when it entered certain "corporate modifications" and settled a lawsuit. Pet. 12-19. In support of that argument, the Bondholders rely primarily upon Ninth Circuit authority holding that the novation of a 1929 real estate lease revived the gold clause within the original lease. *See Fay Corp.*, 646 F. Supp. at 952-53. The court of appeals, however, properly held that the Bondholders' novation theory and *Fay* are "inapposite in the context of bond obligations". Pet. App. 12a. The gold bonds were "issued" only once, the date they were delivered to the first holder. They are not "reissued" each time a bond is traded, or when the original obligor merges with another company or undergoes a reorganization. *See Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521, 528 n.5 (Cal. Ct. App. 1995) (stating that the date of "issue" should be determined based "on the legal structure of the bonds and not novation").[15]

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[15] The Bondholders also cite *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied sub nom. Harry Goodkin & Co. v. Abrahamson*, 436 U.S. 905, *and cert. denied*, 436 U.S. 913 (1978), and a securities law treatise for the proposition that the Bonds were "issued"

If the rule were otherwise, the 1977 amendment would be turned on its head. The express intent of that amendment is to remain "neutral" concerning bonds issued prior to 1977. *See supra* p. 5. Under the Bondholders' novation theory, however, those bonds would become payable in gold whenever the obligor acquires new assets or alters its corporate form. The court of appeals correctly observed that the Bondholders' theory of novation would "render virtually all [pre-1977 gold bonds] payable in gold". Pet. App. 13a. Thus, the court properly refused "to accept the view that Congress intended to alter so radically the obligations of bonds that have been in public circulation for nearly a century, when the language and history of [the 1977] amendment suggest[] a contrary purpose". *Id.* 14a. Moreover, the bond market would be seriously disrupted if, as the Bondholders' argue, a corporation's obligations on its bonds were somehow altered or changed each time it underwent a corporate change.

V. THE FACTS OF THIS CASE DO NOT MAKE THE GOLD CLAUSES ENFORCEABLE.

A. Post-1977 Events Did Not Effect A Novation Of The Gold Bonds.

Even if the Bondholders' interpretation of the 1977 amendment were accepted at face value—*i.e.*, bonds may be "novated" and the novation of a gold bond causes it to "issue" under that amendment—the Bondholders are simply wrong that the Railroad effected a post-1977 novation of its gold

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after 1977. *Abrahamson* and the securities law treatise, however, address Rule 10b-5 of the 1934 Securities Exchange Act, which prohibits fraudulent activity "in connection with the *purchase* or *sale* of any security". Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (1994) (emphasis added); *see Abrahamson*, 568 F.2d at 868. Neither of these authorities addresses the statutes at issue nor their operative language—"obligation issued".

bonds. The common law elements for a novation are well settled. There must be "(1) a previously valid obligation; (2) agreement of all parties to a new contract; (3) extinguishment of the old contract; and (4) a valid new contract". *Healey v. Healey*, 594 N.Y.S.2d 90, 91 (N.Y. App. Div. 1993); *see also MacPherson v. Franco*, 208 P.2d 641, 642 (Wash. 1949); 58 Am. Jur. 2d *Novation* § 13, at 619 (1989).[16] As the court of appeals concluded, the transactions identified in the Complaint did not effect a novation because "the old obligations were never extinguished", "no new obligor was substituted", and "the Railroad did not undertake any new debt obligation". Pet. App. 14a n.4.

1. The 1981 Name Change Did Not Effect A Novation.

The Bondholders point out that supplemental indentures relating to a 1981 transaction in which the Railroad changed

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[16] Novation is never presumed. *See, e.g., Beck v. Mfrs. Hanover Trust Co.*, 481 N.Y.S.2d 211, 218 (N.Y. Sup. Ct. 1984); *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 736 F. Supp. 1281, 1284 (S.D.N.Y. 1990), *aff'd*, 925 F.2d 566 (2d Cir. 1991). It will be found only when a "clear and definite intention" to effect a novation exists. *See, e.g., Beck*, 481 N.Y.S.2d at 218; 58 Am. Jur. 2d *Novation* § 16, at 622-23 (1989); 22 N.Y. Jur. 2d *Contracts* § 406, at 321-22 (1982). Where, as here, "the intention of the parties to a transaction claimed to effect a novation is expressed in writing, the intention of the parties is a question of law for the court to decide". *Security Benefit Life Ins. Co. v. FDIC*, 804 F. Supp. 217, 228 (D. Kan. 1992); *see also Walker v. KFC Corp.*, 728 F.2d 1215, 1217 (9th Cir. 1984); 58 Am. Jur. 2d *Novation* § 52, at 648 (1989). Thus, contrary to the Bondholders' contentions (Pet. 16), the existence of a novation does not always (or even often) raise a question of fact. The rule that the interpretation of unambiguous contracts is a matter of law for a court applies with particular force to bond indentures because such agreements are "not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties". *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983).

its name state that Burlington Northern Railroad Company "assume[d]" liability on the Bonds "so that . . . Burlington Northern Railroad Company shall succeed to and be substituted for Burlington Northern Inc." Pet. 17. Apparently on the theory that the addition of a new obligor and the release of an old obligor can effect a novation, *see, e.g.*, Restatement (Second) of Contracts § 280(a)(1) (1979), the Bondholders argue that the supplemental indentures reflecting the Railroad's 1981 name change resulted in a "novation", Pet. 16-17.

The Bondholders are mistaken. *First*, the supplemental indentures reflecting the 1981 name change did not add a "new" obligor. The Railroad continued to be the exact same corporate entity, having the same assets, liabilities, officers, directors, and employees. The only thing that did change, its name, is immaterial for purposes of a novation analysis.[17] *Second*, the 1981 supplemental indentures say nothing about releasing from liability a previous obligor, a necessary element for a novation where a subsequent agreement adds a new obligor.[18] *Finally*, the stated intention of the 1981

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[17] *See, e.g.*, *American Express Travel Related Servs. Co. v. Berlye*, 414 S.E.2d 499, 501 (Ga. Ct. App. 1991); *John Wanamaker N.Y., Inc. v. Comfort*, 53 F.2d 751, 753 (5th Cir.), *cert. denied*, 285 U.S. 560 (1931); *cf. Cyrix Corp. v. Intel Corp.*, 803 F. Supp. 1200, 1210 (E.D. Tex. 1992) ("[a] corporate name change does not affect the legal existence or any of the . . . obligations of the corporation"), *appeal dismissed*, 9 F.3d 978 (Fed. Cir. 1993); 48 C.F.R. §§ 42.1200-42.1205 (1993) (government-contract regulations distinguishing between novation and change-of-name agreements).

[18] *See, e.g.*, *Security Benefit*, 804 F. Supp. at 227 ("essential element of a novation is a release of all claim of liability against the original debtor"); *Wilson v. Midstate Indus., Inc.*, 777 S.W.2d 310, 312-13 (Mo. Ct. App. 1989) (addition of new debtor is not a novation unless the parties intended to release the old debtor); 22 N.Y. Jur. 2d *Contracts* § 409, at 323-24 (1982) ("An essential element of a novation is the release of the obligor from all liability on the original obligation by the extinguishment

supplemental indentures was not to create any new indebtedness, but to evidence the continued existence of an old indebtedness.[19] As a matter of law, an instrument whose stated purpose is merely to evidence previously existing debt does not effect a novation.[20]

2. The Other "Mergers and Consolidations" And The *Rievman* Settlement Did Not Effect A Novation.

Each of the "mergers or consolidations" and the *Rievman* settlement referred to in the Complaint involved the release by the trustees of certain collateral securing the Bonds, and in the case of the four "mergers or consolidations", also involved the *addition* of new collateral. The Bondholders assert that "[a] novation can result from a change in security for an indebtedness". Pet. 13. But variations in collateral do not automatically effect a novation. The rule is that "a mere change in . . . the character of the security, unless so intended by the parties, does not operate as a novation". 66 C.J.S. *Novation* § 11(b)(1), at 693 (1950) (footnote omitted). There is no special significance to variations in collateral, and the

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of the obligation, and the mere acceptance of the obligation of the third person, without such agreement or intention as to the release of the original debtor, is not sufficient to constitute a novation.") (citations omitted).

[19] The 1981 supplemental indentures, captioned "Providing for the Continuation of Obligations by Reason of the Change of Name of Burlington Northern Inc. to Burlington Northern Railroad Company", list as their purpose "to evidence" or "to record" "the change in corporate name", and refer to the obligation of payment created in the indentures as "continuing", "unbroken", and "uninterrupted". Burke Ex. C, F, K.

[20] *See, e.g., Davis v. Gutheil*, 152 P. 14, 16 (Wash. 1915) (novation requires "the substitution, not of a new paper or note, but of a new obligation in lieu of the old one"); *accord Gary-Wheaton Bank v. Burt*, 433 N.E.2d 315, 320-21 (Ill. App. Ct. 1982); 11 Am. Jur. 2d *Bills and Notes* § 59, at 84-85 (1963).

Bondholders' suggestion to the contrary finds no support whatsoever in either authority or logic.[21]

In any event, like the supplemental indentures reflecting the 1981 name change, each agreement at issue contains language that is, as a matter of law, utterly incompatible with novation. Each of the supplemental indentures reflecting the four "mergers or consolidations" stated that its purpose was merely to provide for the subjection of property of the merging or dissolving entity to the lien of the Great Northern Indenture, Burke Ex. L, M, N, O; stated that the Railroad executed the document out of a "desir[e] to comply with the provisions of the [Great Northern Indenture]", *id.*; and expressed a clear intent to leave the Great Northern Indenture intact by saying that the supplemental indentures "shall be subject to the provisions" thereof, *id.* Similarly, the *Rievman* settlement agreement said that "[n]othing contained in [the] Stipulation . . . shall affect the obligation of [the Railroad] to pay principal of and interest on the [Northern Pacific Bonds] when due", Burke Ex. P, and that "[a]ll rights, duties and obligations under the [Northern Pacific Bonds and the Northern Pacific Indentures] in effect prior to execution of

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[21] The two bankruptcy-court cases upon which the Bondholders rely, *In re Tardy*, 18 B.R. 36 (Bankr. C.D. Ill. 1982), and *Averhoff v. People Finance Co. (In re Averhoff)*, 18 B.R. 198 (Bankr. N.D. Iowa 1982), show no more than that an agreement varying collateral may effect a novation if all requirements for a novation are otherwise satisfied. *See also Ford Motor Credit Co. v. Beneficial Commercial Corp. (In re McClure)*, 108 B.R. 468, 471 (Bankr. M.D. Pa. 1989); *In re Dukes*, No. 87-830-W, 1988 WL 58009, at *3 (Bankr. S.D. Iowa Feb. 29, 1988); *Liberty Sav. & Loan Ass'n v. Greenberg (In re Greenberg)*, 81 B.R. 662, 665 (Bankr. M.D. Fla. 1987). The Bondholders also rely on a passage in 58 Am. Jur. 2d *Novation* § 40, at 640-41 (1989), but that passage relies solely on cases like *Averhoff* and *Tardy*, and itself cautions that "[e]ach case must be judged on its own particular circumstances", *id.* at 641.

[the] Stipulation . . . shall remain in full force and effect except to the extent provided by [the] Stipulation", *id.*[22]

3. The New Transactions Identified By The Bondholders Are Not Part Of The Record And Did Not Effect A Novation.

For the first time in this litigation, the Bondholders identify in their Petition a series of new transactions they claim resulted in novations. Pet. 16 (citing Pet. App. G). Those transactions do not meet the Complaint's own description of events that may cause gold bonds to revive (Pet. App. 28a-29a (describing transactions in which Railroad "undertook new obligations under the Gold Bonds")), and the facts relating to those transactions are not part of the record below. Thus, the new transactions cannot be a ground for granting *certiorari*.

Moreover, the transactions identified by the Bondholders could not have effected a novation of the Bonds because none of those transactions resulted in an agreement between the Railroad and the Bondholders as a class. *See* 66 C.J.S. *Novation* § 3(b), at 684 (1950) ("a novation is itself a contract; it is a new contract creating new contractual relations") (footnote omitted); *id.* § 11(a), at 691 ("a novation exists only by reason of an agreement"); *Walker*, 728 F.2d at 1217 ("[t]o constitute a novation . . . it is necessary that there be a new contract"). Indeed, those transactions fail even the Bondholders' misguided novation test because they did not

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[22] This "full force and effect" language alone conclusively defeats the notion of a novation. *See, e.g.*, *Polk Chevrolet, Inc. v. Vicaro*, 162 So.2d 761, 765 (La. Ct. App. 1964) (no novation where subsequent agreement provided that terms of original agreement would "remain in full force and effect"); *Mountainview Realty Assocs. v. Stark*, 593 N.Y.S.2d 800, 801 (N.Y. App. Div. 1993) (same); *Melat v. Melat*, 602 A.2d 380, 385 (Pa. Super. Ct. 1992) (same); *Pioneer Credit Corp. v. Carden*, 245 A.2d 891, 895 (Vt. 1968) (same).

change the corporate identity of the Railroad or affect the security for the bonds.

B. Burlington Was Entitled To Summary Judgment.

The Bondholders argue that Judge Dwyer of the district court should have continued Burlington's motion to dismiss, or, in the alternative, for summary judgment under Federal Rule of Civil Procedure 56(f). Judge Dwyer, however, did not abuse his discretion, the applicable standard on this point, in holding that the Bondholders had failed to meet the requirements of Rule 56(f), and the court of appeals did not err in affirming that ruling. The Ninth Circuit and other circuits are in agreement that a Rule 56(f) affidavit does not preclude summary judgment unless it (1) identifies the particular facts sought and (2) demonstrates that those specifically identified facts will raise an issue of material fact so as to defeat summary judgment.[23]

The Bondholders failed to satisfy either requirement. *First*, the Bondholders' filed a Rule 56(f) affidavit that says that they intend to seek "information . . . about defendants' complex corporate activities". Hall Decl. ¶ 4.[24] Language so

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[23] *See, e.g., Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414-15 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1825 (1996); *Morrissey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 35 (1st Cir. 1995); *Sage Realty Corp. v. Insurance Co. of N. Am.*, 34 F.3d 124, 128 (2d Cir. 1994); *Dowling v. City of Philadelphia*, 855 F.2d 136, 139-40 (3d Cir. 1988); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724-5 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 144-42 (5th Cir. 1993); *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989); *Harris v. Duty Free Shoppers Ltd. Partnership*, 940 F.2d 1272, 1276 (9th Cir 1991); *Pasternak v. Lear Petroleum Explorations, Inc.*, 790 F.2d 828, 832-33 (10th Cir. 1986).

[24] The Rule 56(f) affidavit also states that the Bondholders intend to seek "information about the benefits defendants have received from their continued reliance upon the 1933 Resolution and defendants'

vague flunks the specificity test of Rule 56(f). *Second*, the information that the Bondholders sought is legally irrelevant and thus would not elicit evidence that could raise genuine issues of material fact. Because the Bonds were "issued" within the meaning of the 1977 amendment only when they were first delivered, *see supra* pp. 17-19, the information identified in the Bondholders' Rule 56(f) affidavit could not change the conclusion that the Bonds were issued prior to 1977 and thus are unenforceable under the 1933 statute (as recodified). Moreover, even if the Bondholders' novation analysis were applicable, the Rule 56(f) affidavit clearly refers to something other than agreements between Burlington and the Bondholders as a class. Such information is relevant only if the Bondholders' theory that there can be a novation without a new agreement is correct. Because it is not, *see supra* pp. 24-25, that information could not possibly defeat summary judgment.

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continuing attempts to avoid their obligations under the Gold Bonds". Hall Decl. ¶ 4. That information apparently relates to the Bondholders' unjust enrichment claim, which has not been raised as a ground for *certiorari*.

Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 96-51

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

GUY and BONNIE L. ADAMS (and others listed as parties), on their own behalf and on behalf of, and as Class Representatives of, all other persons similarly situated,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
and
BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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13pp

Page

TABLE OF CONTENTS

I. INTRODUCTION 1

II. *TROSTEL* SUPPORTS PETITIONERS' POSITION THAT REVIVED GOLD CLAUSE OBLIGATIONS ARE REQUIRED TO BE PAID IN GOLD; THEREFORE, IT CONFLICTS WITH *ADAMS* 2

A. The Debtor in *Trostel* Was Required To Pay in Gold 2

B. The Corporate Transactions in *Trostel* and *Adams* Created a Substituted Contract or Novation 4

III. *TREBILCOCK* CONTROLS 5

IV. PETITIONERS' EXAMPLES OF TRANSACTIONS CREATING A NOVATION ARE NOT "NEW." 7

V. PETITIONERS WERE IMPROPERLY DEPRIVED OF RULE 56(f) RELIEF 8

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Adams v. Burlington N. Ry. Co., 80 F.3d 1377 (9th Cir. 1996) . . . . . *passim*

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990). 7

Bronson v. Rodes, 74 U.S. (7 Wall.) 229 (1869) 5, 6

Trebilcock v. Wilson, 79 U.S. 687 (1872). 1, 5, 6, 10

Trostel v. American Life & Cas. Inc. Co., 92 F.3d 736 (8th Cir. 1996) . . . . . *passim*

Statutes:

Pub. L. No. 95-147, 91 Stat. 1227 (1977) 2

J. Res. (1933), 48 Stat. 112 (1933). 2

I. INTRODUCTION

In accordance with Supreme Court Rule 15.6, Petitioners respectfully submit this reply brief to address new authority that has been published since Respondents' Brief was filed and certain assertions in Respondents' Brief in Opposition.[1]

On August 14, 1996, the Eighth Circuit Court of Appeals filed its decision in *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), *petitions for rehearing filed* August 27 and September 3, 1996. That case dealt with a lease assignment. The court held that Depression-era legislation directing that gold clause contracts would thereafter be "discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts" did not give a debtor an option to pay a novated lease in either dollars or gold. At the option of the creditor, the lease was payable in gold only. *Trostel* sheds light on the novation issues in this case and shows why there should be no distinction between leases and bonds when they are interpreted as contracts. In these important matters, *Trostel* conflicts with the Ninth Circuit decision in *Adams v. Burlington N. Ry. Co.*, 80 F.3d 1377 (9th Cir. 1996), *petition for cert. filed*, No. 96-51 (U.S. July 9, 1996), which artificially distinguished between leases and bonds and thereby held that the same Depression-era legislation allows payment of bonds in any tender that is legal at the time of payment, at the debtor's option.

Respondents' Brief glosses over the significance of *Trebilcock v. Wilson*, 79 U.S. 687 (1872), in an attempt

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[1] This Reply Brief does not respond to all disagreements Petitioners have with the reasoning in Respondents' Brief.

to trivialize its seminal importance to this case. This is discussed below.

Finally, Respondents inaccurately claim that transactions identified by Petitioners as creating a novation are "new" and outside the record. They are also incorrect in their argument that Petitioners have not established a basis for relief under Federal Rule of Civil Procedure 56(f).

II. *TROSTEL* SUPPORTS PETITIONERS' POSITION THAT REVIVED GOLD CLAUSE OBLIGATIONS ARE REQUIRED TO BE PAID IN GOLD; THEREFORE, IT CONFLICTS WITH *ADAMS*.

A. The Debtor in *Trostel* Was Required To Pay in Gold.

Trostel involved a gold clause in a 1917 commercial property lease assigned to the lessee-debtor in 1990 by the lessee-debtor's corporate parent. The lease contained a gold clause. The lessee maintained that a 1933 congressional resolution[2] declared gold clauses to be against policy and that gold clause obligations could be satisifed

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[2] J. Res. (1933), 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. §463; codified as amended at 31 U.S.C. §5118(d)-(2)). The resolution provided in part that any gold clause obligation "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." The *Adams* court held that this statute gave the debtor the option of paying its debts in any form of legal tender, including gold, and prevented any creditor from enforcing gold clauses in existing or future obligations – until the 1933 Resolution was amended by Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. §463; recodified by Pub. L. No. 97-258 (1982); now codified at 31 U.S.C. §5118(d)(2) (1994)).

by payment "dollar for dollar" in United States currency. *Id.*, 1996 U.S. App. LEXIS 20300, at *4, 8-9.

The Eighth Circuit disagreed. The original legislation made gold clauses unenforceable only to the extent that they were required to be paid only in gold and not in United States currency. *Id.* at *15-16.

> The 1933 act did not magically erase the gold clause from the 1917 lease. Although it rendered the clause unenforceable, there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990.

Id. at *17.

The Eighth Circuit also rejected the lessee's argument that the contract between the lessor and the new lessee did not contain a gold clause because the parties did not intend to include one in their 1990 agreement. Instead, the Eighth Circuit said that in construing a contract, the intent of the parties controls and that absent an ambiguity in the written contract, intent is determined by what the contract itself says. Since the contract was not ambiguous, the court found that the lessee-debtor, in agreeing to be bound by the terms of the 1917 lease, also agreed to be bound by the explicit and unambiguous gold clause in that lease. *Id.* at *19.

This is directly contrary to the holding in *Adams* which gave the debtor the option to pay the Gold Bonds in either gold or dollars. *Id.* at 1381. As such, the two decisions are in conflict on the same important matters within the meaning of Supreme Court Rule 10(a). This is a compelling reason why this Petition should be granted.

B. The Corporate Transactions in *Trostel* and *Adams* Created a Substituted Contract or Novation.

In *Trostel,* the lessee entered into a novation in 1990 when it accepted, assumed, and agreed to be bound by all the terms and conditions of the 1917 lease. This is little different from what Respondents did here. For example, in 1981 Respondents issued Supplemental Indentures and Burlington Northern Railroad Company became the "successor corporation" to the original issuer of the bonds. As such, Respondents assumed all payment and other obligations of the Gold Bonds. Burlington Northern Railroad Company (a distinct corporation) succeeded to and was substituted for Burlington Northern, Inc. (another distinct corporation). *See* Petitioners' Brief at 17. In assuming all the payment and other obligations of the Gold Bonds, Respondents ratified the gold clause obligations for the consideration exchanged in each corporate transaction.

The similarities between the corporate activities in *Trostel* and those in this case are striking. In each case, a substituted contract was created. In neither case should it have mattered that the substituted debtor may not have "intended" to assume a gold clause burden because it unambiguously agreed to be bound anew by the terms of the original contract that contained and created the obligation. *See Trostel,* 1996 U.S. App. LEXIS 20300, at *19-20. *Trostel* also properly analyzes the facts in a contract-interpretation environment without seeking to distinguish between leases and bonds, both of which are debt instruments. Indeed, the lease-bond distinction adopted by the *Adams* court is not supported by any persuasive authority.[3] The analytical differences

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[3] It is axiomatic that bonds are debt instruments: the bond issuer is the debtor, and the bondholder is the creditor. Every time

[footnote continued]

in *Trostel* and *Adams* also presents a compelling reason why this Petition should be granted.

III. *TREBILCOCK* CONTROLS.

Respondents do not read *Trebilcock* the same way that Petitioners do. Respondents see it as inapposite and applying only to the discharge of debts.[4] Respondents' Brief at 15.

Petitioners see it as controlling and a basic contract case in which the parties called for payment of a debt "in specie." Different kinds of dollars were then in circulation. "In specie" meant payment of dollars in gold. In *Trebilcock,* this Court held that when a contract expressly requires a specific medium or commodity of payment, it can be satisfied only by that actual medium or commodity of payment. There, the contract, a note, required payment in specie and this Court held that the payment and obligation was satisfied only by payment in specie, i.e., in gold. The obligation was not satisfied by payment of other kinds of dollars, which though legal, were not specified in the contract.

As support, the Court cited *Bronson v. Rodes,* 74 U.S. (7 Wall.) 229 (1869), which held that the parties' intent controls the method of payment. Thus, despite the existence of several types of legal tender dollars, an express contract payable in gold and silver coin was to be paid in such coin, not less-valuable existing and lawful currency notes. *Bronson* at 246, 249. The parties'

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a bond is transferred, a new creditor is substituted for the previous creditor. A lease is also a debt instrument. It is a conveyance of a property interest from a lessor to a lessee and a promise by the lessee to pay the lessor.

[4] Respondents ignore the fact that the Gold Bonds are debt instruments.

intent was to require payment in gold or silver coin, nothing else.

It is the dissent in *Bronson* that is adopted by Respondents and the *Adams* court. That dissent directly conflicts with the majority holdings in *Trebilcock* and *Bronson.* Dissenting Justice Miller stated that an act of Congress authorizing U.S. Treasury notes as another form of legal tender, passed after the contract was made, allowed a discharge of the contract in that form of money "without regard to the intent of the parties on that point." *Id.* at 257-58.

Thus, if as Respondents and the Ninth Circuit in *Adams* maintain, the Gold Bonds involved in this case were "issued" only once, when they first became securities, it logically follows that:

- The parties' intent at the time of "issue" was that these bonds be paid only in gold or its equivalent.
- Now that gold clauses are enforceable, and consistent with *Trebilcock* and *Bronson,* payment of the Gold Bonds must once again be in gold or its equivalent because that is what the parties intended.
- Respondents cannot have it both ways: either the Gold Bonds were "issued" when they first became securities, as the *Adams* court held, or they are "issued" each time they are sold or transferred to a new creditor and the debtor becomes obligated to pay that new creditor in accordance with the contract's terms, as Petitioners maintain. If the former, all bonds are payable in gold or its equivalent according to the parties' original intent; if the latter, at least those bonds purchased before 1933-34 and after 1977 are payable in gold or its equivalent, in accordance with the parties' intent and post-1977 legislation.

- If the Gold Bonds were "issued" only once, and all resulting rights and obligations (absent a novation or other contract substitution) were created at that time, it is simply irrelevant when the current holder purchased its bonds – whether before or after the 1933 and 1934 legislation.[5]
- Nor is the economic impact of Petitioners' demand relevant. Even if it is, there is no evidence in the record as to what that impact would be. Moreover, Respondents' directors, officers and shareholders are the ones who have enjoyed the financial windfall created by the 1933 abrogation of gold clause obligations.

In addition, because the contract issues are governed by Washington law, they are subject to the contract interpretation standards of *Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990), which allows factual inquiry and the use of extrinsic evidence regarding the parties' intent and the circumstances under which a contract or substituted contract, were formed.

IV. PETITIONERS' EXAMPLES OF TRANSACTIONS CREATING A NOVATION ARE NOT "NEW."

Respondents argue that some of the transactions presented by Petitioners which result in a novation are "new" and "not part of the record below." Respondents' Brief at 24. This is false. The Excerpts of Record presented to the Ninth Circuit in June 1994 refer to these transactions at page 85.

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[5]In fact, some of the Petitioners purchased their bonds before the 1933 legislation.

V. PETITIONERS WERE IMPROPERLY DEPRIVED OF RULE 56(f) RELIEF.

Two and one-half months after Petitioners filed their Complaint, and after refusing to respond to detailed pending discovery, Respondents moved for summary judgment in this case. The discovery that Respondents refused to answer related in significant part to their corporate transactions and to whether they had entered into substituted contracts or novations. For example, Petitioners asked for all documents relating to Respondents' corporate "spin-off," "merger," "consolidation," and "restructuring" activities; their relevant corporate records; records showing their effort "to defease or exchange any of the gold bonds"; their records of the *Rievman* settlement; and correspondence with the Gold Bond trustees – all of which Respondents refused to provide.

Federal Rule of Civil Procedure 56(f) requires only that the nonmoving party "for reasons stated" show why it cannot "present by affidavit facts essential to justify the party's opposition" to the summary judgment motion.

Petitioners' Rule 56 declaration must be read in conjunction with Petitioners' outstanding discovery. Indeed, it incorporated that discovery as follows:

> 2. *Plaintiffs' Discovery Requests.* On January 21, 1994, plaintiffs served defendants with Plaintiffs First Request For Production To Defendants. A copy of these initial discovery requests is attached as Exhibit 1.
>
> 3. *Defendants' Objections.* On February 23, 1994, defendants filed their "responses" and objections to plaintiffs' initial discovery requests. A

copy of these responses and objections is attached as Exhibit 2.

4. *Rule 56(f) Request.* At this early stage in the lawsuit, plaintiffs believe defendants' motion for summary judgment is inappropriate. In the course of discovery in this lawsuit, plaintiffs intend to seek production of information from defendants and third parties about defendants' complex corporate activities which plaintiffs believe results in novations of the Gold Bonds. Plaintiffs also intend to seek information about the benefits defendants have received from their continued reliance upon the 1933 Resolution and defendants' continuing attempts to avoid their obligations under the Gold Bonds. This information is critical to plaintiffs' claims for breach of contract, breach of implied duty of good faith and fair dealing, and unjust enrichment. Because this case is in its initial stages, and in part because of defendants' refusal to respond to plaintiffs' reasonable initial discovery requests, plaintiffs cannot now present by declarations facts essential to justify plaintiffs' opposition to defendants' summary judgment motion. Therefore, plaintiffs ask the court to refuse defendants' application for summary judgment or order a continuance so that plaintiffs' discovery may be pursued.

5. *Future Discovery.* Even with this litigation in its infancy, it is clear that plaintiffs will need to (among other things) propound substantial written discovery and conduct depositions of defendants, their representatives and various third parties, including the Gold Bond trustees, representatives of the entities defendants merged with, and the parties and lawyers who were involved in the *Rievman* litigation.

Excerpts of Record before the Ninth Circuit at 197-225.

To say, as Respondents state in their Brief at 25-26, that "[l]anguage so vague flunks the specificity test of Rule 56(f)" is not only inaccurate but demeans the fine reputation of the statement's author.

Petitioners' Rule 56(f) affidavit, taken as a whole, significantly identified the facts Petitioners sought to establish and demonstrated how those facts would raise an issue of material fact so as to defeat summary judgment.

VI. CONCLUSION

Broadly speaking, and without waiving any arguments in their Petition, Petitioners believe that the decision of the Ninth Circuit should be reversed if this Court reaches any one of the following conclusions:

(1) The Gold Bonds are now required to be paid in gold, in accordance with the original intent of the contracting parties; or

(2) *Trebilcock* (and now *Trostel*) do not give a Gold Bond debtor the option to discharge its post-1977 substituted contract debt by the tender of dollars instead of gold; or

(3) This material issue of fact must be resolved at trial: Did Respondents enter into a substituted contract after October 1977? or

(4) Petitioners are entitled to Rule 56(f) relief.

This is a significant case dealing with great issues of public and financial importance. It involves the interpretation of contracts and the rights of contracting parties. The issues are not isolated, as the current number of active Court of Appeals cases involving Gold Bonds attests. Moreover, this case involves conflicting decisions between the Eighth and Ninth Circuits. As such, the

Petition for Writ of Certiorari should be granted, and ultimately this matter should be remanded back to the trial court for appropriate trial proceedings.

Dated September 20, 1996.

Respectfully submitted,

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No. 96-51

IN THE

Supreme Court Of The United States

October Term, 1995

GUY AND BONNIE L. ADAMS, *et. al.*,
ON THEIR OWN BEHALF AND AS CLASS REPRESENTATIVES
OF ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
AND BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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September 27, 1996

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Pursuant to Supreme Court Rule 15(8), Respondents Burlington Northern Railroad Company (the "Railroad") and Burlington Northern Inc. submit this supplemental brief to address *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), which was decided on August 14, 1996, after Respondents filed their opposition brief, and raised by Petitioners for the first time in their reply brief on September 20, 1996.[1] Petitioners contend that the Eighth Circuit's decision in *Trostel* is in conflict with the Ninth Circuit's decision in this case and that the Eighth Circuit's decision supports their contention that they are entitled to payment of principal and interest in gold on bonds issued almost a century ago. Reply Br. 2-5. The Petitioners are mistaken.

Like the Ninth Circuit in this case (Opp. Br. 8), the Eighth Circuit in *Trostel* correctly identified the relevant statutory framework governing obligations requiring payment in gold:

> "In 1933 Congress passed legislation which affected all gold clauses. A joint resolution of Congress declared gold clauses to be against public policy and provided that 'dollar for dollar' payments in United States currency would discharge any obligation. . . . . Subsequently in 1975 Congress repealed the ban on private ownership of gold, and in 1977 it passed an amendment to the 1933 gold clause statute. The amendment provided that the provisions of the 1933 statute would not apply to obligations issued after October 27, 1977." 92 F.3d at 738 (citations omitted).

The issue before the Eighth Circuit in *Trostel* was whether a gold clause within a 1917 real restate lease was rendered enforceable when the parties to that lease entered a new, 1990

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[1] Because Petitioners served their reply brief by mail, Respondents did not receive that brief until September 25, 1996. Respondents are filing this supplemental brief as expeditiously as possible.

lease agreement—a novation—that incorporated the terms of the 1917 lease. In holding that the 1990 novation of the real estate lease could cause a gold obligation to "issue" within the meaning of the 1977 amendment, the Eighth Circuit followed an earlier Ninth Circuit case, *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990)), *see* 92 F.3d at 741, which was properly distinguished by the court of appeals in this case, *see* Pet. App. 13a. There is simply no conflict between the Circuits.

In this case, the court of appeals refused to enforce gold clauses in bonds issued nearly a century ago under the novation analysis applied in *Fay* and now by the Eighth Circuit in *Trostel* for two reasons. *First*, the court held that the term "issued" as used in the 1977 amendment has a very specific meaning with respect to bonds: "A bond obligation is 'entered into,' or 'issued' when the bond first 'comes into the hands of a holder, so executed and delivered as to bind the obligor'". Pet. App. 11a (citing 6A Fletcher Cyc. Corp. § 2688 (1989)). Accordingly, the court correctly held that cases involving real estate leases, such as *Fay* and *Trostel*, had no application to cases involving bonds, such as this case:

> "Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue. . . . If either the sale of bonds, or the merger of the obligor with an agreement to honor outstanding bonds, were to effectuate a new issue of the bonds, the prospective nature of the 1977 amendment would be almost entirely defeated in the major area of corporate bonds. It was the intent of the 1977 amendment to remain 'neutral' concerning bonds issued prior to 1977, not to render virtually all of them payable in gold, which would be the effect were Adams' doctrine of novation applied to bond obligations. Moreover, the issuance of corporate

> bonds is subject to a well-developed, specialized body of law, and the general law of novation is not easily injected into that context. Although sometimes described as a specific type of contract, bonds are financial instruments inherently different from leases, which were at issue in the cases that Adams cites. Bonds are regularly sold and purchased in large, impersonal markets, by corporations that frequently undergo corporate changes, while lease holds generally involve a small number of readily ascertainable and stable parties who can engage in the type of bargaining and mutual consent necessary for a novation. . . . We are unable to accept the view that Congress intended to alter so radically the obligations of bonds that have been in public circulation for nearly a century, when the language and history of its amendment suggests a contrary purpose. We conclude that none of the theories of novation advanced by Adams are sufficient to cause us to recede from the view that the Railroad's bonds were 'issued' on the date of first issue, in 1896 or 1921, as the case may be. They consequently are subject to the 1933 statute and may be paid with any legal tender." Pet. App. 13a-14a (citations and footnotes omitted).

The court of appeals' holding that novation analysis does not apply to corporate bonds is consistent with the decisions of every other court that has addressed the issue. *See Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521, 528 n.5 (Cal. Ct. App. 1995); *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.*, 649 P.2d 947, 950 (Ala. 1982).

Second, the court of appeals held here that "[e]ven if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation". Pet. 14a n.4. As the Eighth Circuit held in *Trostel*, a novation occurs where

the parties enter a new agreement and extinguish the old agreement. 92 F.3d at 740; *see also* Op. Br. 20. In *Trostel*, the parties did not dispute "that the 1990 [real estate lease] transaction was anything other than a novation". 92 F.3d at 741. In contrast, the agreements between the bondholders as a class and the Railroad at issue here "expressly indicated a continuity of the original obligations to the bondholders, the old obligations were never extinguished, and no new obligor was substituted". Pet. App. 14a n.4. Under these agreements, "there was no new bond issuance because the Railroad did not undertake any new debt obligation". *Id.*; *see also* Op. Br. 19-25. Thus, the court of appeals correctly held that the gold bonds were unenforceable even under the novation analysis applied in *Fay* and applied again, and consistently, in *Trostel*.[2]

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[2] The Petitioners frivolously suggest that *Trostel* is in conflict with the court of appeals' holding here that pre-1977 gold clause obligations may be discharged in any legal tender under the 1933 joint resolution as amended in 1977. Reply Br. 2-3. In *Trostel*, the Eighth Circuit correctly held that obligations issued before 1977—such as the gold bonds at issue here—could be discharged in any legal tender, not just gold coin. 92 F.3d at 738, 742. The issue before the court in *Trostel* was whether the 1990 novation of a 1917 real estate lease caused a new obligation to "issue" after 1977, and if so, whether that new obligation contained a gold clause. *Id.* at 740-41. Because the Railroad's gold bonds were issued well before 1977, as shown, there simply is no conflict between *Trostel* and this case.

Conclusion

For the foregoing reasons, the Eighth Circuit's recent decision in *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), is perfectly consistent with Ninth Circuit authority in general and the decision of the court of appeals here in particular. *Trostel* does not make this case worthy of *certiorari*.

Respectfully submitted,

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